

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

No. 77-2103

United States Court of Appeals for the Second Circuit.

B
Pg 5

LOUIS OSTRER,
PETITIONER, APPELLANT,

v.

UNITED STATES OF AMERICA,
RESPONDENT, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

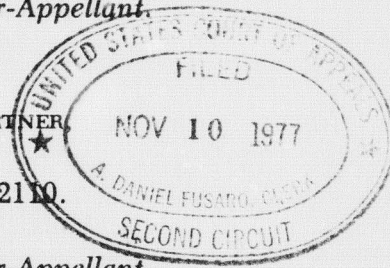
Brief of the Petitioner-Appellant.

ALAN DERSHOWITZ,
Faculty Office Building,
Harvard Law School,
Cambridge, Massachusetts 02138.
(617) 495-4617

Counsel for Petitioner-Appellant.

HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO & GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.
(617) 723-2624

Co-counsel for Petitioner-Appellant.



On the Brief:

KENNETH KURNOS,
SILVERGLATE, SHAPIRO & GERTNER.

BATEMAN & SLADE, INC.

BOSTON, MASSACHUSETTS.

TABLE OF CONTENTS

Issues presented for review	1
Statement of the case	3
Introductory statement	3
Proceedings below	8
Prior proceedings below	8
Current proceedings below	9
Opinion below	11
Facts	11
Fact findings by the Court below	25
1. Natco/Merchandise Plus bankruptcy fraud	26
2. Hellerman's trip to Switzerland	29
3. Reduction in Hellerman's legal fee	32
Conclusions of the Court below	35
The incompetent juror issue	40
Argument	44
Introduction	44
I. This case is controlled by the Supreme Court's ruling in Giglio v. United States -- a decision which is not disturbed by the subsequent decision in United States v. Agurs.	44
II. Even if this case is not controlled by Giglio v. United States, the conviction must be vacated because the Government did not respond fully to a specific defense request for exculpatory material that put the Government on notice as to what was demanded. Indeed, the Government intentionally suppressed crucial evidence of its dealings with its key witness.	57

III. Appellant's affidavit submitted on the juror issue requires either remand for an evidentiary hearing or the grant of a new trial without further hearing.	70
Conclusions	73
Addenda	74
Addendum #1	75
Addendum #2	78
Addendum #3	83
Addendum #4	89

TABLE OF AUTHORITIES CITED

Cases

Alcorta v. Texas, 355 U.S. 28 (1957)	47, 48
Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977)	53, 54
Brach v. United States, 542 F.2d 46 (2d Cir. 1976)	51, 54n
Brady v. Maryland, 373 U.S. 83 (1963) 1, 2, 4, 5, 6, 7, 11 et seq.	
Bronston v. United States, 409 U.S. 352 (1973)	47
Cannon v. Alabama, 558 F.2d 1211 (5th Cir. 1977)	53n
Connolly v. Georgia, ___ U.S. ___, 97 S.Ct. 546 (1977)	63, 64
Davis v. Alaska, 415 U.S. 308 (1974)	59
DeMarco v. United States, 415 U.S. 449 (1974)	49n, 50n
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	49n
Dupart v. United States, 541 F.2d 1148 (5th Cir. 1976)	54n

Table of Authorities Cited

iii

Farese v. United States, 428 F.2d 178 (5th Cir. 1970)	71
Giglio v. United States, 405 U.S. 150 (1972)	5, 49, 50n, 51, 52, 53n, 54n et seq.
Leyva v. Superintendent, Green Haven Correctional Facility, 428 F.Supp. 1 (E.D.N.Y. 1977)	55n
Marshall v. United States, 360 U.S. 310 (1959)	72
Miller v. Pate, 366 U.S. 1 (1967)	48, 49
Mooney v. Holohan, 294 U.S. 103 (1935)	45, 46, 47, 48
Moynahan v. Manson, 419 F.Supp. 1139 (D.Conn. 1976), aff'd, 559 F.2d 1204 (1977), pet. for cert. filed September 13, 1977, 46 U.S.L.W. 3264	50n, 51n
Napue v. Illinois, 360 U.S. 264 (1959)	48, 50n, 54n, 55n
Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976)	53n
Pyle v. Kansas, 317 U.S. 213 (1942)	47, 48
Santobello v. New York, 404 U.S. 257 (1971)	64n
Tumey v. Ohio, 373 U.S. 510 (1927)	63
Turner v. Louisiana, 379 U.S. 466 (1965)	71
United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976)	5, 7, 35, 45, 47, 49n, 50 et seq.
United States v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977)	59n
United States v. Archer, 486 F.2d 670	63n
United States v. Badalamente, 507 F.2d 12 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975)	62n
United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974), cert. denied, 419 U.S. 829 (1974)	8, 11n, 41, 70, 71
United States v. Franzese, 392 F.2d 954 (2d Cir. 1968)	62

United States ^s v. Howard, 506 F.2d 865 (5th Cir. 1975)	72
United States v. Koss, 506 F.2d 1103 (2d Cir. 1974)	39
United States v. Librach, 520 F.2d 550 (8th Cir. 1975)	69, 70
United States v. Librach, 536 F.2d 1228 (8th Cir. 197	68
United States v. Marsi, 547 F.2d 932 (5th Cir. 1977), cert. denied, 22 Cr.L.Rptr. 4037	63n
United States v. McCrane, 527 F.2d 906 (3d Cir. 1975), vac. and rem. ___ U.S. ___, 96 S.Ct. 3197 (June 20, 1976)	54n
United States v. McCrane, 547 F.2d 204 (3d Cir. 1976)	54n
United States v. Ostrer, 422 F.Supp. 93 (S.D.N.Y. 1976)	9, 10n, 11n, 12n
United States v. Ostrer, 551 F.2d 303 (2d Cir. 1977), cert. denied, ___ U.S. ___, 97 S.Ct. 1581 (1977)	9
United States v. Ott, 489 F.2d 872 (7th Cir. 1973)	57n
United States v. Pannos et al., N.D.Ill., No. 70 CR 469 (July 23, 1974)	50n
United States v. Rhodes, 556 F.2d 599 (1st Cir. 1977)	72n
United States v. Rosner, 516 F.2d 269 (2d Cir. 1975)	57n
United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976)	52, 53, 54n
United States v. Todaro, 550 F.2d 1300 (2d Cir. 1977)	58n
United States ex rel. Annunziata v. Manson, 425 F.Supp. 1272 (D.Conn. 1977), C.A. No. 77-2017 (argued September 16, 1977)	51n, 55, 56, 59n
United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970)	72

Table of Authorities Cited

v

Ward v. Village of Monroeville, 409 U.S. 57 (1972)	63
Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965)	63

Constitutional and Statutory Provisions

United States Constitution

Fourth Amendment	63
Sixth Amendment	71
Fourteenth Amendment	47
18 U.S.C.	
§152	69
§1621	47
§1751(g)	68n
§2255	5, 9, 10, 58n
§3059	68n
20 U.S.C. 886	68n
28 U.S.C.	
§524	68
§1865(b)(4)	2, 8, 41
39 U.S.C. 404(a)(8)	68n

Miscellaneous

American Bar Association, Standards Relating to the Prosecution Function §3.11	57n
Cannavale and Falcon, Improving Witness Cooperation: Summary Report of the District of Columbia Witness Survey and a Handbook for Witness Management (United States Department of Justice, National Law Enforcement and Criminal Justice Law Enforce- ment Assistance Administration, 1976)	65
Code of Professional Responsibility, Canon 7, Ethical Consideration 7-28	64
Federal Rules of Criminal Procedure, Rule 33	8
Graham, F., The Alias Program (Little, Brown & Co., 1977)	67n

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

LOUIS OSTRER,
Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,
Respondent, Appellee.

No. 77-2103

On Appeal From the United States District Court
For the Southern District of New York.

Brief of the Petitioner-Appellant.

Issues Presented for Review

I. Did the Court below apply an improper standard in determining the degree of likelihood of prejudice which a criminal defendant must prove in order to vacate his conviction and sentence, where the Court found the following violations of Brady v. Maryland, 373 U.S. 83 (1963) to have infected the trial:

A. Where the Court below found that the Chief of the Criminal Division of the United States Attorney's Office engaged in a conspiracy with the Government's chief prosecution witness to funnel a

large amount of cash from a bankrupt corporation to the witness for his personal use, and where this activity was intentionally hidden from the defendant's attorney and from the trial judge?

B. Where the Court below found that the Government had failed to disclose to defense counsel that the Government had assisted the chief prosecution witness in obtaining Court permission from another judge to leave the country on a Swiss trip just before the witness was scheduled to begin serving a prison sentence and to testify at Appellant's trial?

II. Did the Court below err in refusing to classify as a Brady violation the making of a telephone call by the Chief of the Criminal Division to the chief prosecution witness' lawyer, one of the results of which was to effect a fifty-thousand dollar reduction in the one-hundred-thousand dollar fee set by the lawyer?

III. Did the Court below err in refusing to vacate the Appellant's conviction and sentence because of the Brady violations set out in Questions I and II, supra, even under the stricter standard used by the Court in determining whether the Appellant had suffered sufficient prejudice from the violations?

IV. Did the Court below err in refusing to convene an evidentiary hearing to examine serious factual allegations that one of the jurors on the Appellant's jury

A. had at the time of trial a mental infirmity making her incapable of rendering efficient jury service within the meaning of 28 U.S.C. 1865(b)(4), and

B. was influenced in reaching her verdict by admonitions and reasons to convict Appellant improperly given to her by two of her friends during the trial?

Statement of the Case

Introductory Statement.

This appeal raises a recurring and important constitutional issue, although it does so in a setting where the Court below made findings of fact that place this case in a category unto itself in terms of the seriousness, indeed the shocking nature, of the violations of this Appellant's constitutional rights. In the face of a carefully orchestrated effort by a certain person or persons in the Government to cover-up these violations, it was by sheer fortuity that the Appellant learned about them and was able to bring them to the Court's attention in his habeas motion.

The Court below found, inter alia, the following facts:

1. The Defendant's petition arose out of "a single unexpected event", namely the publication, by the Government's chief trial witness against Defendant, one Michael Hellerman, of a book entitled Wall Street Swindler, which revealed certain facts, previously unknown to defense counsel and to the Court, which, if true, "would have been useful to the defense in attacking Hellerman's credibility."

(A. 310-311)

2. The Defendant's "conviction was dependent on Hellerman's testimony." (A. 311)

3. "Ostrer's trial counsel specifically requested that the Government make available any material bearing adversely on the credibility, character or reputation of Hellerman." (A. 311)

4. The Chief of the Criminal Division of the United States Attorney's Office participated in and aided a successful effort by Hellerman to

obtain for his personal use \$80,000. that belonged to the estate of a bankrupt corporation and was owed to its creditors. The Chief of the Criminal Division accomplished this through a ruse: "Having found that but for the Government activity previously described, Hellerman would not have gained access to the \$80,000., we are constrained to find that the Government thereby conferred a benefit on its cooperating witness Hellerman which should have been disclosed to the defense." (A. 321)

5. "The Government's failure to alert defense counsel to this matter [of the \$80,000.] was intentional", and failure to inform the defense was purposeful and constituted "intentional non-compliance" with the Brady obligation. (A. 322)

6. The Government knowingly conferred yet another benefit on Hellerman when it decided "not to oppose Hellerman's plans for a trip to Europe while he was awaiting sentence." (A. 325) "Failing to oppose permission for Hellerman to travel was certainly a reward for his cooperation....The Government should have alerted the defense to Hellerman's European trip, since it failed to oppose bail enlargement to permit the trip to go forward, a rather unusual benefit under the circumstances of this case." (A. 325)

7. "In the logical belief that once the attorney [for Hellerman] was informed of [Hellerman's] status as a cooperating witness, the fee [being charged Hellerman by his attorney, namely \$100,000.] would be substantially reduced, Hellerman asked the Chief to notify the attorney of this fact. The Chief did call the attorney and Hellerman's fee was subsequently reduced by \$50,000. Hellerman thanked the Chief for his efforts." (A. 328) "...[T]he result or consequence of the Chief's

call to counsel was a reduction in fees. The Chief may have expected that this would be the result of the call." (A. 328-329) This telephone call was not disclosed to defense counsel.

The Judge in the Court below, the Hon. Charles L. Brieant, who presided over the evidentiary hearing on the Defendant's motion under 18 U.S.C. §2255, but who had not presided at the trial itself, concluded that these and other facts found by him at the evidentiary hearing did not require reversal of Defendant's conviction, because the Government had provided defense counsel at trial with other information with which to impeach Hellerman, namely some of Hellerman's prior crimes, and hence the Brady material not provided becomes of diluted importance, to the point where, in the Judge's view, it would not likely have raised a reasonable doubt in the minds of the jurors. (A. 349) Furthermore, ruled the Judge, this additional suppressed evidence of Government "largesse" toward Hellerman would not "probably" have raised a reasonable doubt, since "the jury was well acquainted with the Government's lenient treatment of Hellerman." (A. 350)

Appellant contends, first, that the Court below used the wrong standard in deciding what quantum of proof of prejudice had to be met by Defendant, in light of the facts proven and found, in order to prevail and, second, that he has demonstrated such prejudice that he must prevail.

This appeal concerns the proper application of the commands of the Supreme Court in a triad of cases -- Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963); and United States v. Agurs, 96 S.Ct. 2392 (1976). Collectively, these cases dictate the Government's responsibilities in providing a defendant with information which may tend to exculpate him or cast serious doubt on the Government's case in chief or mitigate his punishment, in responding to specific defense requests for such

information, and in refusing to tolerate the submission of false testimony as part of the Government's presentation to the fact-finder.

It is Appellant's contention that the Court below miscategorized certain actions of the Government as being outside the Brady ambit and misapplied the governing law in evaluating the effect of all these actions upon Ostrer's trial. If the District Court's opinion is allowed to stand, then this Court will have placed its imprimatur upon a series of wholly erroneous rulings which would have the effect of nullifying the Brady rule in a large number of situations where the Government is either clever, devious, corrupt, or sloppy, or where Government witnesses are sufficiently "rotten" so that suppressed Brady material could be seen as merely "cumulative".

An affirmance in this case would, as well, approve holdings to the effect that (1) actions by a prosecutor which only "incidentally" benefit a cooperating witness do not constitute Brady material and (2) the Government may assist in providing pecuniary benefits (in this case stolen funds) to cooperating witnesses and never disclose those payments, so long as the payments are merely Government "largesse" and are not payments negotiated directly and explicitly in exchange for testimony.

Finally, an affirmance of the ruling below that Ostrer's conviction is not so flawed by Due Process violations that a new trial must result would serve notice on the Government that, as long as its "cooperating witness" is shown at trial to have in the distant past been sufficiently disreputable, then the Government's cover-up of its own illicit and sordid dealings with him, while he was an informant and a witness, will meet with no sanction, since the jury's learning of such an additional, albeit more current and/or more serious blot on the witness' (and the Government's)

character will be classified (if ever disclosed) as harmless error. The incentives for improper prosecutorial actions and inactions, and the prospects of a serious erosion of defendants' rights to a fair trial, if the District Court opinion stands, are clear.

Appellant will argue also that it is improper as a matter of law, under any possible Brady and Agurs standard, to refuse to grant relief here, in light of the egregious factual situation found by the Court below to have existed. In the first place, defense counsel at the trial made an effort to argue to the jury that Hellerman had in effect been "bribed" by the Government to give his testimony -- testimony which was in effect "bought" by the Government. However, because the only then-available impeachment evidence of promises and inducements to Hellerman involved leniency in terms of numbers of indictments and recommendations for sentence, the Government objected (and the trial Judge sustained the objections each time) that it was improper for the defense to argue "bought" testimony, obviously because there was no foundation evidence that any money payment to the witness was involved.

In addition, the Government on numerous occasions and in numerous ways, over the objections of defense counsel which were overruled, placed its own imprimatur on Hellerman's credibility as a newly-reformed former criminal and liar who was now going straight. Had defense counsel, the Court, and the jury known just of the incident involving the \$80,000., the Government, which was involved in what could be considered a criminal conspiracy in violation of larceny and bankruptcy laws, would hardly have been in a position to vouch for Hellerman's, or its own, credibility.

In addition, Appellant filed affidavits on a second, distinct issue, which entitled him to an evidentiary hearing. Specifically, Ostrer presented

newly discovered evidence to support a prior, unsuccessful claim that a juror was not in a sound state of mind at the time of trial. Further sworn evidence was proffered on an entirely new claim -- that the same juror had fallen under the influence of two of her friends who successfully counselled, while the trial was proceeding, that she vote to convict the Defendant. These serious sworn allegations required that evidence be taken.

Proceedings Below.

Prior Proceedings Below.

Louis Ostrer was charged in a forty-count indictment with violations of certain provisions of the Federal securities laws, mail fraud, and conspiracy. The Trial Court ordered acquittals on twenty-three counts. The jury acquitted Ostrer on six counts and convicted him on eleven. Between verdict and sentence, and within the period prescribed by Rule 33, F.R.Cr.P., Ostrer filed a new trial motion on the ground that an unsolicited post-conviction letter from one of the jurors to one of the defendants indicated that the juror was unfit for jury duty, thereby depriving the defendant of his right to a jury of twelve persons of sound mind, in violation of 28 U.S.C. 1865(b)(4). The motions for new trial and for an evidentiary hearing were denied by the Trial Court, and the conviction was subsequently affirmed on appeal by a divided Court sub nom. United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974), cert. denied, 419 U.S. 829 (1974). The Defendant's showing did not rise to the level of proof such as to require that an evidentiary hearing be held, according to this Court.

Thereafter, Ostrer learned that prior to and during his trial, he was the subject of unlawful wiretapping and electronic eavesdropping, and at an evidentiary hearing he showed that there was actual communication to the

Federal trial prosecutor, prior to his trial, of information gleaned from the unlawful wiretap. The motion for relief was denied by the District Court*, United States v. Ostrer, 422 F.Supp. 93 (S.D.N.Y. 1976), and was affirmed on appeal, United States v. Ostrer, 551 F.2d 303 (2d Cir. 1977), cert. denied, ___ U.S. ___, 97 S.Ct. 1581 (1977).

Current Proceedings Below.

Then a most remarkable event occurred. Michael Hellerman, the Government's chief witness at Ostrer's trial, published a book entitled Wall Street Swindler (Doubleday & Co., Inc., 1977),** an autobiography recounting the author's life, first as a master criminal and then, after a re-birth of sorts mid-wifed by the Government, as a master prosecution witness. A reading of this book supplied Ostrer with sufficient information to file a motion under 18 U.S.C. 2255, seeking to have his conviction and sentence vacated on the ground that the Government had suppressed important exculpatory material in its possession prior to and at the time of Ostrer's trial. This material, it was alleged in the motion, would have been useful, indeed critical, in enabling Ostrer's defense counsel to destroy Hellerman's credibility, not to mention the Government's credibility, before the jury. Since the Court

*The case had been tried before a jury presided over by Chief Judge Edelstein. However, at the time this particular motion was filed, Chief Judge Edelstein referred the case to another judge for further proceedings, all of which have been before the Hon. Charles L. Brieant.

**The actual text of the book, Wall Street Swindler, was admitted into evidence and made part of the record by the court below. It has not, of course, been reproduced as part of the Appendix, but it is available for inspection in the Record. The book was written with the cooperation of a ghost writer, Thomas C. Renner, based upon tape recordings Renner made of numerous interviews with Hellerman.

had ruled previously* that the jury's belief of at least crucial parts of Hellerman's testimony was a sine qua non to Ostrer's conviction, Ostrer argued in his motion that the information in the book, if true, required that that conviction be vacated. The Court convened an evidentiary hearing at which Hellerman was ordered produced**, and after hearing Hellerman and numerous other witnesses over the course of four days of testimony and argument, the Judge made and filed his "Findings and Conclusions", set out in the Appendix at 310-361.

Included in a companion motion under 18 U.S.C. 2255 was a claim that Ostrer had recently discovered additional and firmer evidence that the juror involved in the first motion for new trial and appeal was in fact of unsound mind at the time of the trial. (A. 211) In addition, Defendant produced evidence for the first time that during the course of the trial, in violation of the repeated admonitions of the trial judge, this same juror discussed the case at home with two friends and was urged by those friends to convict the Defendant. This evidence, both of mental instability and of improper outside influence put to bear on this juror, was contained in an affidavit of the juror's brother, who witnessed these events first-hand.

*Judge Brieant had previously found, in another context, that Ostrer would not have been convicted if the jury had not believed critical parts of Hellerman's testimony against Ostrer. See United States v. Ostrer, 422 F.Supp. at 106. This finding was re-affirmed by Judge Brieant in his opinion on the instant motion. "Clearly, the conviction was dependent on Hellerman's testimony." (A. 311) The reason why this is an obvious conclusion will be discussed, infra, when we deal with the charges and the evidence at the trial itself.

**Hellerman was admitted into the United States Marshals' Service Witness Protection Program, and was given a new identity and location. Hellerman therefore was not available to be interviewed by defense counsel, who had no idea where he was, and he was thus produced by order of the Court.

The Court's "Findings and Conclusions" discussed in great detail the Brady allegations in the case, although the juror issue was disposed of in a footnote refusing relief or even an evidentiary hearing.*

The Court below denied the motion but granted Ostrer continued bail pending review by this Court, because it found, inter alia, that Ostrer has raised "a substantial challenge to his conviction" and presented "colorable claims affecting his constitutional right to a fair trial." (A. 351)

This appeal followed.

Opinion Below

The opinion by the Honorable Charles L. Brieant of the United States District Court for the Southern District of New York is not yet reported and is reproduced in the Appendix, at 310-361.

Facts**

Michael Hellerman was the self-admitted architect of the conspiracy

*In that footnote, the District Court stated that the branch of the motion relating to the juror "has presented no new evidence...concerning Geneva Rush [the juror], which had not already been before the Court of Appeals in 1974...." In fact, Defendant had never before presented any evidence from anyone who claimed to know this juror to the effect that she was of unsound mind, and since the reason the Defendant failed in his earlier motion on this point was because he did not have precisely this kind of threshold evidence to trigger an evidentiary hearing, it would seem that the new information was vital. Furthermore, never before in this case was there any claim that an outside person influenced Juror Rush's verdict. The Court below seemingly ignored, perhaps inadvertently, this part of Defendant's proffer of evidence. (A. 353-354, n. 3)

**Some familiarity with the Belmont Franchising stock manipulation trial is assumed in view of the rather detailed expositions found in United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974) and United States v. Ostrer, 422 F.Supp. 93 (S.D.N.Y. 1976). It is important to understand the Government's claims at the trial, and the nature of the evidence presented, in order to understand fully Ostrer's claims in this appeal.

to manipulate the securities of Belmont Franchising Corporation. That fact was admitted by both Hellerman and the Government. Hellerman's plan was to control all of the outstanding Belmont shares and to "jiggle" the price up from \$5. to over \$50. per share, and to then dump the shares (the so-called "bust out") onto the unsuspecting public.* In order to control all of these other shares so that a supply of stock would not be unexpectedly thrown onto the open market and upset the manipulations, Hellerman either had to purchase the shares himself (an undertaking which he could not afford at the time) or to convince others to purchase the stock and thus place the shares in the hands of persons over whom Hellerman had sufficient control or influence.

Louis Ostrer was one of these several persons in whose hands Hellerman placed a block of Belmont shares. There was no dispute at trial that Ostrer purchased shares of Belmont. The only issue was whether Hellerman told Ostrer, and whether Ostrer knew, that the stock was a target for manipulation, rather than that the shares in Ostrer's mind represented simply a good investment to be held onto until Hellerman advised selling them.

Hellerman testified that he had told Ostrer that the stock was manipulated. If the jury did not believe this single piece of testimony, Ostrer would have been acquitted. It was for this reason that Judge Brieant found that "clearly, the conviction was dependent on Hellerman's testimony."** Ostrer's trial counsel, in his summation to the jury, argued that the credibility of Hellerman was the key to the case (A. 1112), and that the

*See United States v. Ostrer, 422 F.Supp. at 101-102 (S.D.N.Y. 1976).

** (A. 311). Earlier, Judge Brieant found that "the proof against Ostrer was substantial, if the jury found the testimony of Hellerman credible, as indeed it must have done in order to have returned these guilty verdicts." United States v. Ostrer, 422 F.Supp. 93, 106 (S.D.N.Y. 1976).

Government's entire case rested on Hellerman's testimony. (A. 1160) The trial prosecutor argued to the jury, in a similar vein, that the critical issue in the case was whether Hellerman ever told Ostrer that the stock was being manipulated. (A. 1180-1181, 1192) That Hellerman's testimony was crucial to the success of the Government's case has not been subject to an iota of dispute at any point during these proceedings.

The defense, of course, sought to attack Hellerman's credibility in any way it could. The Government, for its part, sought to bolster that credibility in the eyes of the jurors. The trial prosecutor stated that he was prepared for a barrage of cross-examination questions regarding Hellerman's hopes of leniency from the Government. (A. 473) Defense counsel, on the other hand, sought whatever information they could get concerning "open investigations" of the activities of Government witnesses, in hopes of spelling out for the jury the full extent of the leniency proffered. (A. 473, 964) The Government at several points during the trial seemingly encouraged the defense and the jury to focus on questions of Government promises in the nature of leniency, either by way of non-prosecution, or by way of recommendation of a modest sentence for all of Hellerman's many admitted crimes. Thus, the prosecutor noted that Hellerman's credibility was being attacked "by virtue of his constant examination on the question of his past crimes" and that the defense "asked him questions designed to show his expectation in respect of prosecution at the hands of the government." (A. 1037)

The Government adopted what must have seemed to the defense at the time to be the most logical approach for the Government to take with a witness who had committed so many crimes.* The trial prosecutor argued to the

*Judge Briant summarized the evidence as to Hellerman's criminal activity in his "Findings" at A. 348-349.

jury that Hellerman was, to be sure, no angel, and that in fact the jury could find that he was "one of the rottenest creatures you have ever run across" (A. 1171) and "scum". (A. 1174) However, the prosecutor stated with seeming certainty, Hellerman, since the date of his written plea agreement with the Government, had turned over a new leaf and was now the new Michael Hellerman. The prosecutor argued that the jurors might find that the witnesses "for once in their rotten lives you may find from the evidence that they [the Government's co-conspirator witnesses] were telling the truth." (A. 1190)

For his part, Hellerman appeared to be frank with the jury in admitting the details of his sordid past. In cross-examination, he did not seem to so much as hedge in admitting what a scoundrel he had been once upon a time. However, he claimed, he was now a new man, and now he was telling the truth.

This presentation of Hellerman as a "born again" citizen was assisted in a most dramatic fashion by the existence of a unique (at the time) "Memorandum of Agreement" -- a written agreement into which Hellerman entered with the Government. The written agreement followed an earlier oral agreement in which Hellerman had promised the then-Chief of the Criminal Division of the United States Attorney's office (hereinafter the "Chief"*) that he would commit no further crimes and would give the Government information.** After Hellerman reneged on this verbal agreement (he succumbed to the temptation of a lucrative stock fraud), the Government

*Since the Court below somewhat delicately refers to the then-Chief of the Criminal Division simply as the "Chief", rather than by name, we shall follow this same practice throughout this brief.

**The details of the verbal agreement, and the history of its being followed by the written agreement, were described by the Chief during a robing room conference which the Chief was asked to attend during the trial. (A. 631-646)

got serious with him and negotiated with his counsel a written agreement setting forth a number of undertakings.* The written agreement differed from the oral agreement in a number of critical ways, the most important of which were that under the written agreement, (1) Hellerman had to enter three felony guilty pleas, (2) Hellerman had to testify truthfully for the Government, (3) Hellerman had to face a substantial prison sentence, and (4) the Government would prosecute Hellerman on all past and future crimes, to the full extent of the law, if he should break the Agreement.

Thus, Hellerman's plea bargain required him, inter alia, to tell the truth at all trials at which he was requested to testify, on pain of having the whole plea bargain withdrawn.

The defense was shocked at the very existence of such a bold, written plea bargain, and in fact Ostrer's counsel's first reaction was to move for a mis-trial. (A. 552-563) In the end, of course, defense counsel was relegated to the position of having to argue that Hellerman obtained great benefit from the written agreement, notwithstanding the fact that pursuant to that agreement, he had been sentenced to, and (as Hellerman testified at A. 482) was serving at the very time of his Belmont trial testimony, a two-year term in prison. **

The Government and Hellerman, however, used the very existence and terms of the agreement to good advantage in front of the jury, especially that portion of the agreement which required Hellerman to testify truthfully

*The text of this Agreement is contained in the Appendix at A.Ex. 272. The Court below summarizes the major terms of the Agreement at A. 355-356, fn.6.

**Judge Lasker on Nov. 6, 1972 imposed upon Hellerman a sentence of two years. See judgment at A. 73. This was later reduced substantially, without Government opposition, such that Hellerman ended up serving 3 days in jail and nine months in a safe house. (A. 170, 1331-1332). The three days Hellerman spent in jail were the days between his surrender upon returning from Europe, and the commencement of the Belmont Franchising trial.

on pain of having the whole deal retracted. Thus, Hellerman testified:

"I promised that I would never break the law again in any manner, shape or form, and if I ever did break the law the government had a right to prosecute me for any of the cases that the understanding was that I would not be prosecuted, they would have a right to go back and prosecute me in every one of the cases, and they warned me they would to the fullest extent of the law if I broke the law or did anything that was wrong any more, they warned me."

(A. 970)

In case any juror had any skepticism as to whether the Government meant seriously the threat that it would prosecute Hellerman for any violation of the written agreement, such as for perjury if committed at the Belmont Franchising trial, Hellerman made it plain that the Government had already prosecuted him for violation of the earlier, superceded oral agreement. He had had a golden deal under the oral agreement, with no jail sentence and no need even to testify in open court, but Hellerman blew it by committing yet another fraud. (A. 1056 and 631-646) When defense counsel attempted to question Hellerman about his breaking the oral agreement (A. 1051-1052), Hellerman readily admitted those prior transgressions (A. 1046) but noted that he was duly punished for that infraction (A. 1056). But now, testified Hellerman, he was telling the truth.

As proof that Hellerman was now telling the truth, the prosecutor did not hesitate to parade before the jury, time and again, the provision of the written agreement between Hellerman and the Government to the effect that if he did not tell the truth, he would be prosecuted. Thus, the written agreement became, in effect, the Government's major, but not only, imprimatur on Hellerman's credibility.* Along these lines, the prosecutor

*Ordinarily, of course, it would be improper for Government counsel to express a personal belief in a witness' credibility.

argued to the jury that Hellerman could not be lying at the trial, for the price he'd have to pay would be too high:

"Now, ladies and gentlemen, I ask you, is a man in a position like that, with the proverbial sword of Damocles hanging over his head, going to take the chance of sitting there on that witness stand and committing a perjury that could be discovered? That is what these able lawyers are trying to tell you he was doing although try might and main as much as they could there wasn't a single pertinent fact that he testified to that they could point to as being false.

"In fact, so far as Mr. Goldberg [counsel for Ostrer's co-defendant] was concerned, there wasn't any cross-examination on the facts at all. It was cross-examination on how bad a guy he was.

* * * * *

"Now, just take that situation and keep it in your minds for a moment. Is a man in the position of Hellerman...with the sword of Damocles hanging over his head going to fabricate evidence when he knows that at any moment he can be tripped up and sent sprawling?"

(A. 1184-1185)

It occurred to defense counsel that the testimony regarding the written agreement was, in effect, a back door way of the Government's vouching for Hellerman's credibility and putting the Government's imprimatur on the truth of what Hellerman was telling the jury. Ostrer's counsel complained that this was precisely what had happened when the prosecutor, on Hellerman's re-direct examination, attempted to elicit from Hellerman's testimony that perjury was out of the question since the agreement forbade it. The jury was witness to this largely successful effort, which was hotly objected to by defense counsel.* The problem of the Government's injecting

* "Q: Is it your understanding in accordance with that agreement that anything would happen should it be shown you testified falsely?

"MR. EDELBAUM: Your Honor, I object to the question and I would like a side bar in connection with that.

(CONTINUED ON NEXT PAGE)

into the case its own credibility in order to bolster that of Hellerman was a recurring theme during the trial.* Even the Court joined now and then to add its own imprimatur to Hellerman's credibility.**

(* CONTINUED FROM PREVIOUS PAGE)

(At the side bar)

"MR. EDELBAUM: Your Honor, in view of that question I move for the withdrawal of a juror and a mistrial...on the ground that what the government is attempting to do is put the weight of the government as certifying that this witness is telling the truth because he is here in the courtroom. The government has made a written agreement with him that if he doesn't tell the truth, that is the implication, that he will be prosecuted. So it is taking away from the jury the very burden they have to assess the credibility of the witness by putting the weight of the government behind -- under this guise of this written agreement that the government would not put him on the stand unless they were convinced he told the truth. And they have him here and I have never heard of such a thing as is being attempted by the government to do this.

* * * * *

"MR. GOLDBERG: With the form of the question and the contents thereof, the government has vouched for the credibility of this witness by putting him on the stand, because it's part of the agreement that he wouldn't testify falsely or be free from the risk of prosecution unless the government had determined that he was testifying falsely. He has evidence on my cross that he has no expectation of being prosecuted presently and those two things lead to one conclusion, that the government has come to a decision that he is testifying truthfully. To that extent the government has injected its own credibility into the case and I ask for the declaration of a mistrial.

* * * * *

"THE COURT: Do you expect to pursue this?

"MR. MCGUIRE: Well, I think I can ask, Your Honor, whether it is the witness' understanding that he is required to testify truthfully.

"THE COURT: I will allow that.

* * * * *

(CONTINUED ON NEXT PAGE)

*See, for example, Mr. Goldberg's remarks at A. 1068-1069.

**When Mr. Goldberg was attacking Hellerman's agreement with the Government during the defense summation, the prosecutor interrupted with an objection, made in front of the jury, that "it is no part of Hellerman's deal with the Government to commit perjury." The prosecutor actually asked the Court to instruct the jury that perjury was not part of Hellerman's deal, and the judge addressed the jury by saying "That is entirely true to the best of my recollection." (A. 1098-1099)

In order to counter the Government's ploy, defense counsel sought to cast doubt upon the Government's own propriety in joining leagues with a man like Hellerman. All such attempts, however, were rebuffed by the Court upon objection of the prosecutor, including, and especially, all attempts by defense counsel to insinuate that the Government had "bought" Hellerman's testimony or was guilty of, in effect, "bribing" him to testify. It is clear from the record that while the Trial Court allowed defense counsel to inquire into promises made to and favors done for Hellerman by the Government with respect to leniency on sentence, the Court did not allow any insinuations that could even be remotely construed by the jury as a charge that the Government had paid Hellerman for his testimony.

Thus, the following colloquy took place when Mr. Goldberg sought to argue to the jury that Hellerman was in effect paid for his testimony:

"MR. GOLDBERG: I suggest to you the thrust of my attack on each of these four witnesses[*] is this: I contend that you should hesitate to act where you are dealing with a person who has a history of immoral and criminal behavior when placed in his path is the expectation of receiving rewards or payment for his testimony.

"MR. MCGUIRE: Objection to that.

"THE COURT: Objection sustained.

"MR. GOLDBERG: The expectation of a reward."

(A. 1092, emphasis supplied)

(* CONTINUED FROM PREVIOUS PAGE)

"MR. EDELBAUM: I think the question is very bad when it is asked after a question like is being stricken out, to follow that. There is an implication that it must be in the agreement. We are going in the back door when we shouldn't go in the front door.

"THE COURT: I will allow it with the additional language to be incorporated in that question, 'Pursuant to his oath,' as suggested by Mr. Goldberg."

(A. 973-977)

*While Hellerman was the Government's entire case against Ostrer, there were other witnesses as well who testified as to the guilt of the co-defendant Dioguardi. Mr. Goldberg, therefore, had to attack the credibility of the four witnesses who testified against his client, whereas Mr. Edelbaum, counsel for Mr. Ostrer, had a more restricted job -- he had to attack Hellerman alone.

Similarly, Mr. Edelbaum during summation had the temerity to suggest that if the defense had given its witnesses the kinds of inducements that the Government gave to Hellerman, it would be considered out-and-out bribery. He was rebuked in that effort, obviously because of the implication, not supported in the record at that time, that Hellerman had been paid for his testimony:

"MR. EDELBAUM:Just imagine, just imagine if when Mr. Jones [a defense witness] or Mr. Wynn [another defense witness] took the witness stand the government discovered or revealed through cross-examination that the defendant or his counsel had bribed Jones or Wynn to come here as witnesses. How much attention would you pay to such a witness? How much consideration would you give to such a witness? Ask yourselves. Is there a difference? Hasn't Hellerman in effect been bribed under certain conditions, certain promises that he made?"

The Trial Court sustained the Government's objection to this line of argument and ordered it struck. (A. 1129, emphasis supplied)

Thus, the trial prosecutor took pains to keep from the jury any implication that Hellerman had been paid -- the obvious conclusion being that the prosecutor feared any implication that money had passed hands. The Trial Judge, as unaware as was defense counsel at the time that \$80,000. in money had indeed passed hands from the Government to Hellerman, sustained all such objections, obviously because there was no foundation at that time that such was the case. On the contrary, when asked about the extent and nature of the promises made and inducements given to him by the Government, Hellerman testified that the entire arrangement was contained in the written agreement about which he spoke at great length. (A. 964a) There was no mention of money in the written agreement.*

*Even though the Court below found that there was much more to Hellerman's working arrangement with the Government than was disclosed in the written agreement, and even though the Court found that reference to the Natco/Merchandise Plus bankruptcy fraud was purposely left out of the written

(CONTINUED ON NEXT PAGE)

The trial prosecutor, obviously continually upset about these implications and fearing their effect on the jury, during his own summation argued that it was the stock manipulators, including (by implication) the defendants, and not the Government, that was guilty of making a practice of pay-offs.*

"MR. McGUIRE:We have heard a lot of argument from the defense lawyers about how evil it is to pay off people. Who is a participant, ladies and gentlemen? And when you point the finger, don't four fingers point back at you?"

(A. 1181)

The prosecutor was not afraid of how the jury would look at the written deal Hellerman had with the Government, so long as the jury did not infer that there was more done for Hellerman, along the lines of bribery, that did not appear in the agreement. After all, on the surface, Hellerman did not really receive a total give-away. During his testimony, he made it perfectly clear that he had been given a two-year prison sentence (A. 979) and he made it clear repeatedly that at the time of his testimony he was actually serving that sentence.** He also testified that as part

(* CONTINUED FROM PREVIOUS PAGE)

agreement (A. 322), he nevertheless found that Hellerman was not perjuring himself at trial when he testified that the written agreement contained every promise or inducement made to him by the Government! (A. 340)

*McGuire was obviously referring to that part of the stock manipulation scheme that involved the payment of bribes to certain stock brokers toward the end of the planned manipulation, to induce them to unload the inflated shares on their unsuspecting clients.

**Hellerman's testimony along these lines was very misleading (A. 482, 763, 834), at the least. He said that he was serving his sentence, but he did not point out that he had just started serving that sentence two or three days prior to the start of the Belmont trial. The reason for this, as was learned during the evidentiary hearing before Judge Brieant, was because Hellerman had sought, and without Government opposition was granted, Court permission to take an extended trip to Switzerland and Europe prior to commencing service of his sentence. Judge Brieant found that this information should have been disclosed to defense counsel under the Brady rule. (A. 325) Furthermore, Hellerman failed to tell the jury that what he called a "prison" was in fact a so-called "safe house" operated by the United States Marshals Service. (A. 1331-1332 and 327.)

of his plea agreement, he had agreed to make \$100,000 restitution to be distributed among the victims of his swindles and that he had already made a \$12,500. initial payment on this obligation.*

Thus, insofar as the jury knew, Hellerman was to serve a two-year prison sentence**, as a result of a plea of guilty to three felony charges, and was to repay \$100,000. to his victims. Little did the jury at the time know, of course, that Hellerman would not in fact serve anywhere near two years, since his sentence was reduced after his Belmont trial testimony***,

*On this point Hellerman's testimony (A. 972-973) was, again, highly misleading to the jury. The \$12,500. payment was not made to the victims. Rather, it was made into an escrow fund held by Hellerman's attorney. Rather than being paid to the victims of Hellerman's swindles, Hellerman, through his attorney, after he completed his testimony at the Belmont trial, successfully moved Judge Lasker for an order returning the larger portion of that money to Hellerman for use in a business venture. (A. 339) As for the balance of \$87,500. that Hellerman told the jury he would pay as soon as he got a job (A. 972-973), Hellerman never did get around to paying it (A. 338-339), and his continued claims at the evidentiary hearing that he still intended to pay it drew sharp expressions of disbelief from Judge Brieant (A. 1467-1468, 1531), who nevertheless concluded that Hellerman had not lied about his intentions at the time of the trial, even if his intentions did change. (A. 338-339) Judge Brieant did not deal with the fact that if Hellerman's testimony about his intentions as to the \$100,000. drew from the Court a rebuke to the effect that Hellerman was a liar (A. 1469), it might have had a similar effect on the Belmont jury that, Judge Brieant found, had believed Hellerman's trial testimony. (A. 311 and 354)

**Hellerman's attorney filed a Rule 35 motion to reduce sentence in March of 1973, two months after Ostrer's verdict. The motion was allowed by Judge Lasker on September 28, 1973, with the Government taking no position on the motion. Hellerman testified at the evidentiary hearing that at the time of the Belmont trial, he had in his mind an intention to have his attorneys file a Rule 35 motion "in the normal course" after a few months. (A. 1483, 1486, 1488)

***Defense counsel had no reason to disbelieve Hellerman at the time of the Belmont trial, for the trial prosecutor in a robing room conference stated the Government would not aid the early release or parole of Hellerman, and that Hellerman's attorneys did not intend to file a Rule 35 motion. (A. 326) Judge Brieant found this statement by the prosecutor to be "facially absurd and unfounded statement to the trial Court" (A. 326), and the Court said that "it is likely that McGuire should not have stated his expectations to the Court". However, the Court found that the prosecutor's "representations were true", even if "his expectation was wrong". (A. 326) Nevertheless, it cannot be denied that the jury received an impression which, it turns out, was entirely false and misleading, for the jury believed that Hellerman was serving a two-year prison sentence as part of his "bargain".

and that he would end up paying out only the tiniest portion of his \$100,000. restitution obligation, even getting back part of the \$12,500. initial payment.*

But with all these undisclosed inducements not known to the jury, the prosecutor was able with confidence to describe Hellerman's plea bargain as not such a good deal for Hellerman. Thus, when Ostrer's counsel complained to the Court that the written agreement was shocking and should not be tolerated in the administration of justice**, the prosecutor confidently responded that "After all, this witness, who is genuinely, and with good reason, in fear for his life, is now serving a two-year sentence. That is scarcely the kind of contingent payment to a witness which should disturb the Court in supervising the administration of justice." (A. 728)

At the trial, Hellerman was protected in yet other ways from effective probing into his veracity. The Trial Judge, during cross-examination, refused to allow defense counsel to ask questions concerning the details of

*Judge Brieant concluded that it was not a realistic and serious intention, even at the time Hellerman testified at the Belmont trial, for Hellerman to really pay the \$100,000. in restitution. "We must recognize this whole matter of the restitution for what it was -- high sounding words calculated to ameliorate Hellerman's sentences on three indictments." The whole idea of making restitution in this amount, found the Court, "is on its face an illusory and foolish thing", and this "should have been readily apparent at the time." (A. 340)

**Touching once again upon an analogy between what the Government was giving Hellerman and out-and-out bribery of a witness -- an analogy which was not allowed to be argued to the jury, as has been noted, supra -- Mr. Edelbaum stated in the robing room:

"It just seems to me that it violates every conception of proper administration of criminal justice to enter into such a written agreement. I shudder to think that if I put a witness on the stand, as a lawyer for the defendant, and there was produced a similar document where I had made a payment for his testimony, I shudder to think what would have happened to me under such circumstances. And I very frankly cannot see any great difference between such a situation and the [agreement]...."

(A. 726-727)

Hellerman's prior criminal activities. (A. 702) The Judge reasoned that defense counsel had "plenty of ammunition" for cross-examining Hellerman (A. 716-717*) and did not have to go into details.** This ruling was applied to inquiry into the details of any charge, crime or indictment other than the Belmont Franchising scheme (the scheme which formed the basis for the indictment then on trial). (A. 714-718)

Finally, the Trial Judge refused to give the jury any special charge on the nature of the inducements offered to Hellerman, despite a specific request by defense counsel. (A. 1074) The Trial Judge instead gave what he described as his "usual" charge on accomplice testimony. (A. 1074) This charge consisted in essence of asking the jury to consider the question "Did the witness have any personal motive to testify as he did? Did the witness have any interest in the outcome of the case?" (A. 1210) The "usual" accomplice instruction left entirely out of the jury's consideration any possibility that Hellerman might have been "paid" anything by the Government.***

*The Trial Judge so ruled in response to an objection by the prosecutor to the intended scope of defense counsel's cross-examination of Hellerman. The prosecutor thought it was enough for Hellerman to mention the name of the swindle, but not to "develop the entire skeleton of each of them as if it were the other crime and not this crime that is on trial here." (A. 715) The Trial Judge agreed that defense counsel had "plenty of solid information on which to proceed without engaging in a discovery and inspection tour. I don't see that it helps us; I think it is a waste of time." (A.717)

**One of the crimes about which defense counsel began to question Hellerman was the Natco/Merchandise Plus bankruptcy fraud, even though counsel had been deprived of the Brady information about the \$80,000. Under the Trial Court's ruling as to the narrow scope of cross-examination as to other crimes of Hellerman, however, counsel had to limit the questioning to the name and general nature of the fraud. (A. 846-847)

***The instruction on accomplice testimony was as follows:

"...persons in the position of accomplices may be motivated by personal reasons connected with promises, grants of immunity, fear of prosecution or other specific reasons, to testify as prosecution witnesses."

(A. 1213)

It is no wonder, then, that the jury came to regard the "born again" Hellerman as an arm of the Government, someone whose credibility was as good as that of the Government that vouched for him. It should have surprised no one, then, when the jury during its deliberations returned to the Court with the following question:

"May we have the date when Mr. Hellerman became a government agent and when it stopped."

(A. 1224) (emphasis supplied)

Hellerman had, indeed, gained with the jury the credibility of a Government agent!

It is with this background in mind -- as to the nature of the Government's proof, the narrow scope of cross-examination allowed, the restrictions placed on defense counsel's argument to the jury, the misleading and indeed dishonest testimony of Hellerman, the Government's vouching for Hellerman, and the ill-advised assurances made by Government counsel to defense counsel and to the Court -- that one begins to understand the enormous importance of the scandalous situation that Judge Brieant has now found to have existed at the time of the Belmont trial.

Fact Findings By the Court Below.*

On the basis of extensive evidence presented, the Court below made findings of fact which lend essential support to Appellant's argument here.

*Judge Brieant, having not presided over the Belmont Franchising trial, saw Michael Hellerman for the first time when the Court convened an evidentiary hearing on Ostrer's motion to vacate sentence. The Court had the benefit not only of observing Hellerman's demeanor and hearing his live testimony, as well as that of all the other witnesses, but it had in evidence certain transcriptions of tape recorded interviews given by Michael Hellerman to Thomas Renner, the co-author of Wall Street Swindler, and it had in evidence the book itself.

and then made certain rulings and conclusions which are being contested on this appeal. These will be discussed, infra.

1. Natco/Merchandise Plus Bankruptcy Fraud.

Judge Brieant found* that Hellerman was desperately in need of funds to pay off some loansharks who were threatening to kill him. Hellerman thereby designed a plan for siphoning \$80,000. from Natco and Merchandise Plus, two companies that were on the verge of bankruptcy as a result of an ongoing scheme engineered earlier by Hellerman to milk their funds. The \$80,000. constituted the last major asset of these companies.

However, Hellerman learned that his cohort in crime, Samuel Falgiano a/k/a Sammy Feet, also had intentions to steal this \$80,000., and Hellerman thus found himself in direct competition with Feet. Hellerman thereupon went to the Chief, disclosed the ongoing bankruptcy fraud, and disclosed that Sammy Feet was about to pick up the \$80,000. at a casino in the Bahamas. The Chief responded by having the FBI freeze the money at the casino's bank in Miami and by retrieving the funds himself. The Chief turned the funds over to a lawyer** hand-picked by Hellerman. Hellerman then used the money for personal purposes, including payment to the loan sharks.

Judge Brieant found that Hellerman "desperately needed" these funds and that he felt that unless he had the money to pay off the loan sharks,

*The facts are set out in Judge Brieant's opinion in A. 314-322.

**This lawyer presented to the Chief a handwritten letter, signed by Hellerman's cohort Schustek, retaining him for the sole purpose of obtaining the \$80,000. (Exhibits Appendix at 15) The lawyer then presented himself and a letter to the Chief demanding the \$80,000. (Exhibits Appendix at 14), which was promptly turned over.

his life would be in danger. (A. 314)* The Court below made the following specific findings of fact:

"(1) the Government prevented Sammy Feet from stealing the \$80,000. in Natco funds by freezing the proceeds of the check which Schustek[**] and Feet had caused to be deposited in the Bahamas casino, which had deposited it in turn in Florida:

"erman and Schustek did reveal the full story of the swindle, including their own participation, to the Government, thereby making the Government fully aware of the intended goal of Natco's bankruptcy, before it released the \$80,000.....;

"(3) the Government was aware before it reached its decision to release the funds to an attorney authorized by Schustek, that Hellerman desperately needed this money to pay off loansharks who were threatening his life."

(A. 318)

The Court below found that the Government's extraordinary largesse

*Hellerman testified at the evidentiary hearing that he feared being killed by the loan sharks. (A. 1353) He also said he needed the money because he was a "high liver". (A. 1481) He said that the Chief at first tried to get Hellerman \$80,000. in official government funds from the Justice Department, but that this effort failed. (A. 1368-1369) Hellerman testified that at the time the Chief retrieved the \$80,000. in Natco funds for Hellerman, the Chief knew that Hellerman intended to pay the money to the loansharks. (A. 1381) The Chief, on the other hand, testified that Hellerman told him that he needed the money to pay the loan sharks. (A. 1574) He at first denied that he tried to get official government funds for Hellerman, but he later said he was not sure of this. (A. 1577) The Chief admitted that Hellerman specifically asked him for assistance in getting the \$80,000. Natco funds in order to pay the loan sharks (A. 1576-1577) and that Hellerman's prior scheme to siphon off the \$80,000. ahead of Sammy Feet had failed. (A. 1583-1583) The Chief admitted that Hellerman sought to enlist his aid in this endeavor. (A. 158) The Chief testified that he did not recall if Hellerman told him afterwards that Hellerman had indeed paid the \$80,000. given to him by the Chief over to the loan sharks. (A. 1584-1585) Finally, the Chief admitted that a few days after he released the \$80,000. to Hellerman, Hellerman stopped bothering the Chief for money. (A. 1585) This essentially uncontradicted testimony by both Hellerman and the Chief makes clear the reasons why Judge Briant chose not to believe the Chief's protestations that he did not intend that the funds would be used personally by Hellerman rather than for legitimate corporate purposes!

**Stephen Schustek was Hellerman's hand-picked cohort in the Natco bankruptcy fraud.

did not go unnoticed by Hellerman:

"Hellerman expressed his own belief, at the evidentiary hearing, and in Wall Street Swindler, that the Government intentionally allowed him to retrieve the \$80,000. thus conferring a substantial benefit on him."

(A. 319)

The intentional nature of the Government's conduct is clear in the Court's findings:

"The Court finds, as it must based on the record before it, that it should have been readily apparent to the Government when it did release these funds, that the money inevitably would end up in Hellerman's pocket. In effect, the Government chose to look the other way. While denying Hellerman's direct request for the money, the Government accorded him the opportunity to gain possession of it indirectly by the charade of having the corporation's 'attorney' demand and receive it for deposit in a corporate bank account.[*] By conscious avoidance the Government thus intentionally eased the way for Hellerman to benefit from its decision to release the \$80,000. in stolen funds to an attorney 'representing' Natco."

(A. 319)

This "charade" was kept secret until Hellerman's publication of Wall Street Swindler. Judge Brieant found that careful and calculated steps were taken by the Chief at the time of the Belmont trial to keep this information from Ostrer's trial counsel. (A. 322) The Court found "intentional non-compliance" with the Brady rule by the Government on the basis of the numerous steps taken or omitted by the Government that effected a cover-up. "So many oversights may not be regarded as merely a coincidence," concluded the Court below. (A. 355)

Judge Brieant concluded that this information concerning the Govern-

*Judge Brieant found that part of the "charade" engaged in by the Government was to pass the funds through a specially opened corporate account before they were taken by Hellerman. In the Judge's words, the "corporate" account was opened in order to "comply with the Government's requirement that it [the funds] be deposited in a corporate account before being stolen." (A. 355, n. 8)

ment's vital role in getting the \$80,000. of stolen Natco funds to Hellerman constituted a violation of Brady v. Maryland. (A. 321)

2. Hellerman's Trip to Switzerland.

Ostrer learned for the first time from reading Wall Street Swindler that just prior to Hellerman's testifying in the Belmont trial, he sought and obtained from Judge Lasker a postponement of his surrender date to begin serving his sentence and permission to travel to Switzerland and elsewhere in Europe.* The Swiss trip ended, and Hellerman began serving his sentence, just a couple of days before he testified at Ostrer's trial.

Judge Brieant found that Hellerman obtained Court permission to make the trip, with no Government opposition to his motion. The Government's non-opposition to this trip was found to be a "benefit" conferred upon Hellerman.** In this connection, Judge Brieant found that "failing to oppose permission for Hellerman to travel was certainly a reward for his cooperation", and that, therefore,

"The Government should have alerted the defense to Hellerman's European trip, since it failed to oppose bail enlargement to permit the trip to go abroad, a rather unusual benefit under the circumstances of this case."

(A. 325)

Judge Brieant further concluded, however, that the Government's failure to inform Ostrer's trial counsel of its role in helping Hellerman enjoy

*Judge Brieant sets out the facts surrounding the Swiss trip in his opinion at A. 322-326.

**"The only benefit which the Government knowingly conferred upon Hellerman here [in connection with the Swiss trip] was the decision not to oppose Hellerman's plans for a trip to Europe while he was awaiting sentence." (A. 325)

this "rather unusual benefit", was unintentional, a mere oversight. (A. 325) This finding was made despite the finding that the Government's allowing Hellerman to make the trip was unusual under the circumstances, as well as the further finding that the Chief "had expressed [to Hellerman's lawyer] the fear that Hellerman might wish to stash funds [in Switzerland] or flee during his trip to Europe..." (A. 325) (See the Chief's testimony on this point at A. 1632.)

In addition, Judge Brieant recognized that even though he did not believe Ostrer's claim at the evidentiary hearing that Hellerman took advantage of the trip to Switzerland to stash \$300,000. in ill-gotten cash in a numbered Swiss bank account, this is an argument that indeed could have been made effectively before the jury:

"Had the defense possessed this information it would then have had the opportunity to cross-examine Hellerman with respect to the trip and to argue to the jury that when the Government failed to oppose this junket, it conferred a benefit. Indeed it could have been argued that Hellerman intended to secrete substantial sums of money in Switzerland."

(A. 325)

In fact, at a subsequent trial at which Hellerman was a Government witness, it was revealed that Hellerman went to Switzerland. Defense counsel were allowed by Judge Metzner to cross-examine on this issue, and Judge Metzner himself, at a bench conference, expressed the view that Hellerman likely secreted funds in Switzerland. The following colloquy took place at that trial, United States v. Koss, 73-CR-903, trial transcript at 350-355, submitted as an evidentiary exhibit in this case, between Judge Metzner, Assistant U.S. Attorney Sorkin, and defense counsel:

"MR. SORKIN: He was not in custody at the time. He went to Switzerland. That has been brought up before. I concede that part of the trip to Switzerland was a vacation. On the other

hand, an equal part of the trip to Switzerland was to find a place for relocation because of the threats upon his life.

"THE COURT: How about getting a numbered Swiss bank account?

"MR. HUFF: It is relocating closer to his funds.

"MR. PANZER: That is going to be one of my questions.

"THE COURT: It is perfectly obvious, isn't it, Mr. Sorkin?

"MR. SORKIN: It is and I have no objection to bringing it up. We sincerely believe one of the reasons is to get out of the United States to look for a place in Europe.

"THE COURT: Sure, that is where his money would be."

[emphasis added]

Judge Brieant's rulings on this issue appear to be equivocal. On the one hand, he ruled that the prosecution had a duty to disclose this item to the defense. On the other, he seems to have felt that this omission is mitigated because the failure was, in his view, unintentional. He nevertheless considered the omission to be a Brady violation, although not one that requires the allowance of Ostrer's motion to vacate sentence. Judge Brieant seems not to have considered the possibility that Hellerman considered the Government's non-opposition to his trip to be a reward*, and that Hellerman lied in claiming that all of the promises and inducements made to him were contained in the written agreement.** The jury, if it had known about the trip, might have reached the same conclusion that Judge Metzner and the Assistant U.S. Attorney in the Koss case apparently did.

*At the evidentiary hearing, Hellerman testified that his motion for enlargement of bail conditions in order that he might travel to Europe was filed just prior to the signing of his written agreement with the Government. (A. 1437)

**Hellerman effectively cut off cross-examination questions at trial concerning Government promises to him by stating unequivocally that all such promises and inducements were set out in the written agreement. (A. 969a) This, of course, turned out to be a materially false statement in view of the omission of information about the \$80,000. of Natco funds, the Swiss trip, and other points discussed infra.

3. Reduction in Hellerman's Legal Fee.

Hellerman retained a law firm that set a fee for him of \$100,000.* However, when this fee was set, the attorneys did not know that Hellerman was a cooperating witness and would not be going to trial. At this point, the following scenario took place:

"In the logical belief that once the attorney was informed of his status as a cooperating witness, the fee would be substantially reduced, Hellerman asked the Chief to notify the attorney of this fact. The Chief did call the attorney and Hellerman's fee was subsequently reduced by \$50,000. Hellerman thanked the Chief for his efforts."

(A. 328)

Judge Brieant concluded, however, that the Government in those circumstances "neither sought nor won a fee reduction for the benefit of Hellerman". (A. 328) The Court did "recognize that the result or consequence of the Chief's call to counsel was a reduction in fees." (A. 328) The Court even admitted that "The chief may have expected that this would be the result of the call." (A. 328-329) However, in the Court's view, since the Government had every right, perhaps even a duty, to inform Hellerman's counsel of his status as a cooperating witness, "the fee reduction was incidental". (A. 329) Concluded the Court:

"The Government cannot be said to be conferring a benefit through the disclosure of required information simply because that information happens to be beneficial. We therefore find that the Government did not violate Brady by failing to inform defense counsel of the Chief's contacts with Hellerman's counsel."

(A. 329)

In the first place, these conclusions were drawn by the Court in the

*Judge Brieant's discussion and findings concerning the reduction of Hellerman's legal fee are set out in his opinion at A. 328-330.

face of the following testimony at the evidentiary hearing. Hellerman testified that:

1) One reason Hellerman retained this particular lawyer was because the Chief had told Hellerman that he trusted and respected the lawyer. (A. 1426-1427)

2) Hellerman discussed with the Chief the question of the high legal fee being asked by the law firm. (A. 1427-1428)

3) Hellerman had the Chief phone the lawyer, rather than Hellerman's doing it himself, because the Chief knew the lawyer better than did Hellerman. (A. 112)

4) Hellerman told the Chief that once the Chief explained Hellerman's deal with the Government to the lawyer, Hellerman would get a more reasonable fee. (A. 1433-1434)

5) Hellerman told the Chief afterwards that the fee was reduced, and Hellerman recalled the Chief's smirking when told about the fee reduction. (A. 1433-1434)

The Chief, in his testimony at the evidentiary hearing, confirmed in major part Hellerman's testimony on this point. He testified as follows:

1) Hellerman telephoned the Chief to discuss the lawyer's fee being too high. (A. 1615)

2) Hellerman asked the Chief to contact the lawyer and discuss the fee to try to get a reduction.* (A. 1615-1617)

*At this point the Chief testified that he told Hellerman that he felt that it would be inappropriate for the Chief to ask Hellerman's lawyer for a reduced fee for Hellerman. (A. 1616) However, the Chief then testified that he did agree to phone the lawyer and inform him of Hellerman's relationship with the Government. When asked whether at the time he was aware that "the intended effect of the call was to have Mr. Broderick reduce the fee", Judge Brieant interjected with the comment "I think it is clear from the record already, isn't it? Has not the witness already told us that?" (A. 1616) This is obviously the basis for the Judge's finding that "The Chief may have expected that this would be the result of the call." (A. 328-329)

3) The Chief testified that he did not remember if he discussed the fee with the lawyer. (A. 1643)

4) The Chief testified that it was possible that Hellerman later told him that the lawyer did indeed reduce the fee. (A. 1618)

Judge Brieant's conclusion that, based upon these essentially undisputed facts, the Government's assistance to Hellerman in obtaining a \$50,000. reduction in legal fee did not constitute Brady material because it was "incidental" to the Chief's telling Hellerman's lawyer of Hellerman's status, entirely misses the point. The Chief understood that a fee reduction was likely to be effected by his acquiescing to Hellerman's request to call the attorney. Hellerman believed that the Chief was doing him this favor to get him a fee reduction and that the Chief could deliver since the Chief was friendly with the lawyer.* It is conceded by the Court below that the phone call did have the at least "incidental" effect of getting a fee reduction. Why, then, should it matter whether this benefit, conferred knowingly by the Government on Hellerman, was "incidental" or was the main purpose of the phone call? The fact is that this was yet another in a chain of substantial financial favors done for Hellerman by the Chief, which were not revealed to Ostrer's trial counsel. The Natco \$80,000. and the \$50,000. fee reduction alone add up to \$130,000. worth of undisclosed Government-procured inducements to Hellerman, all in violation of Brady.

*If the only purpose of the Chief's phone call was to inform the lawyer that Hellerman was a cooperating witness rather than a true defendant, then certainly Hellerman did not need the Chief to tell his lawyer; Hellerman could have done it himself. What Hellerman wanted, of course, was for the Chief to use his close relationship with the lawyer in order to effect a fee reduction.

Conclusions of the Court Below.

The Court below applied a standard that it thought was required in light of the Supreme Court's opinion in United States v. Agurs, 427 U.S. 97 (1976).^{*} Using the selected standard as a measuring rod, the Court said:

"We conclude that in Ostrer's case no reasonable person could say that the suppressed evidence probably would have altered the outcome of the trial. This conclusion is based on the fact that the Ostrer jury was already abundantly aware of Hellerman's cooperation with the Government, the substantial benefits he had obtained thereby, and of his participation in fraudulent and illegal schemes without number."

(A. 347)

The Court rejected Ostrer's contention that the suppressed material would not have been merely cumulative for the jury, since it attested to the Government's willingness "to pay generously for Hellerman's testimony." The Court based its rejection on three perceived factors.

First, stated the Court, "there is no essential difference between pecuniary benefits which are given in exchange for testimony and benefits in the form of freedom from prosecution."

Secondly, the Court said, "the Government's willingness to close its eyes to Hellerman's appropriation of the \$80,000. has not been shown to have been a negotiated benefit in exchange for Hellerman's testimony."^{**} Clearly,

^{*}The question of the correctness of the Court's choice of a standard is discussed in the argument section of this brief, infra.

^{**}The Court below makes this statement notwithstanding its specific finding that one of the reasons it was to the Government's benefit to help Hellerman steal the \$80,000. was because, as the Chief recognized, Hellerman's life would be in danger if he could not pay the loan sharks, and this kind of danger would have required the Government to prematurely pull Hellerman off the street as an informant and place him in protective custody instead. "...it was in the Government's interests to leave Hellerman at liberty on an undercover basis as an informant rather than placing him in a safe house. Nor did Hellerman want to go into hiding or flee." (A. 318)

the "gift" of \$80,000. in stolen funds to Hellerman was meant to keep the Government's witness alive and happy, as the Judge's findings so amply demonstrate. Surely, if Hellerman were not a Government witness, would the Chief have helped him in his battle with Sammy Feet for possession of these funds? (Surely this connection was made in Hellerman's mind!)

The third reason the Court rejected Ostrer's contention that the pecuniary benefits fell into a distinct class all their own is stated as follows:

"There is reason to believe that Hellerman's embezzlement of the \$80,000. was tolerated only because of the Government's awareness that unless Hellerman could repay his debts, his life, and therefore his testimony would be endangered. Thus, the \$80,000. can be considered as merely one facet of the Government's broader program to guarantee Hellerman's safety rather than as an effort to put cash in his pocket."

(A. 348)

This is a remarkable rationalization indeed for the Government's participation with Hellerman in a larceny and in a violation of Federal bankruptcy laws. In the first place, it directly contradicts the second stated reason for rejecting Ostrer's contentions, for it shows beyond any doubt that there was a definite connection between Hellerman's status as a witness and the \$80,000. favor done for him by the Chief. If Ostrer has not shown the appropriation of the \$80,000. "to have been a negotiated benefit in exchange for Hellerman's testimony"* , then it is not clear what, if anything, could ever qualify as such a benefit. In the second place, it ignores the fact that the Department of Justice took great pains to establish strict rules and regulations governing the Witness Protection Program in which Hellerman was ultimately registered, and those rules made it ab-

*There is, of course, no basis in law for the proposition that unless so clear and extravagant a favor done by the Government for a witness is the direct product of a formal negotiation process, it does not constitute Brady material.

solutely clear that witnesses were not to be given more than \$30. per day "subsistence" payments, and that if there were special circumstances justifying, higher payments, specific approval had to be sought from the Department of Justice.* Apparently the Chief tried to obtain some amount of official government funds for Hellerman**, and when that effort failed, he took matters into his own hands and improperly funnelled stolen funds to Hellerman.

Despite the startling nature of the revelations brought out at the evidentiary hearing and found by the Court below, the Court stated that this suppressed material would not have struck the jury any differently than it was struck by the revelations at trial of crimes committed by Hellerman (without Government assistance) before his "born again" period began. The Court insisted that there would be no difference in the mind of a juror between a concession by the Government limiting Hellerman's guilty plea to three indictments and his liability to prison to "only" five years (he in fact was sentenced to two years), and the kinds of "concessions" revealed at the hearing. (A. 348-349) The Court ignored entirely the problems encountered by the defense at the trial in exploring the details of Hellerman's criminal past (including the Natco swindle), in countering the Government's support of Hellerman's credibility, in extracting the full truth from Hellerman, and in arguing that Hellerman's testimony had in effect been bought. It is clear that the suppressed material, if it had been

*These special rules and regulations governing the Witness Protection Program will be discussed infra at pages 65-67.

**See Hellerman's testimony on this point at the evidentiary hearing. (A. 1368-1369) The Chief did not deny this story, saying instead that he could not remember. (A. 1576-1577)

disclosed, would have constituted the very core of the defense arguments at trial.*

Finally, the Court below concluded that "one more promise or benefit to Hellerman is no evidence of Ostrer's innocence." (A. 349) This casual observation, made in the face of such a sordid record of knowing suppression of Brady material of the most scandalous kind, completely ignores the importance of allowing the jury to learn as much impeachment evidence concerning a critical individual co-conspirator witness as is available. In fact, this Court of Appeals, faced with an appeal from another defendant convicted in another case on the basis, in part, of Hellerman's testimony, made the following observations in denying that particular appellant's claim for relief from the Government's use of a man like Hellerman as a witness:

"The jury was fully advised regarding Hellerman's relations with the United States Attorney's Office and the crimes he committed before and after he first cooperated with that office regarding his stock-swindling activities. That being so, it was for the jury to decide to what extent, if any, his testimony could be believed.

* * * * *

"Defense counsel at trial questioned Hellerman intensively and revealed him to be an untiring securities con-artist....

* * * * *

"Appellants do not now come forward with any additional information of perjury or other crimes committed by Hellerman of which the jury was not advised.

* * * * *

*In fact, the Court misread entirely a most significant aspect of the trial record. The Court recounts in its Findings that at the trial, defense counsel "emphasized clearly to the jury that the Government had 'bought' the testimony of a man who, having promised the United States Attorney's Office once before that he would not commit any more crimes, then went out and continued his corrupt and sordid activities." (A. 349) The fact is that each time defense counsel sought to do so much as analogize the Government's treatment of Hellerman with "payment" for testimony or bribery of a witness, the Trial Court upheld the Government's strenuous objections. (A. 1092, 1129) The Government, in its summation to the jury, pointed out that there was no evidence at trial of any such Government bribes to Hellerman. (A. 1181)

"Here, however, the jury had before it a full catalogue of Hellerman's misdeeds, double dealings and prevarications.

* * * *

"At no time did the government condone Hellerman's illegal activities or encourage him to participate in any questionable conduct.

* * * *

"In any event, we note that the participation of the appellants in the AIS manipulation was so abundantly proven by other evidence which corroborated in essential details almost all of Hellerman's testimony that it is difficult to see how the jury could have done otherwise than convict them."

United States v. Koss, 506 F.2d 1103 (2d Cir. 1974), at 1111-1112.

[emphasis supplied]

It is uncontested that in the case at bar, the jury was not "fully advised regarding Hellerman's relations with the United States Attorney's Office"; defense counsel was not allowed to cross-examine Hellerman at trial as to the details of his crimes, such as the Natco bankruptcy fraud; Ostrer has come forward with substantial evidence of both perjury and additional crimes "committed by Hellerman of which the jury was not advised"; the jury did not have before it "a full catalogue of Hellerman's [or the Government's] misdeeds, double dealings and prevarications"; and, finally, it is now clear that the Government did indeed "condone Hellerman's illegal activities" and "encourage him to participate in...questionable conduct." Finally, the Court below has found on numerous occasions, and has reiterated in its Findings here, that Hellerman's testimony was the key that convicted Ostrer, and without the jury's belief in Hellerman's credibility, there could not have been a conviction. It would seem that Ostrer is entitled to a summary reversal just on the basis of this Court's opinion in Koss alone.*

*Perhaps one of Ostrer's most potent arguments as to the corrosive effect that these revelations would have had upon the jury's view of Hellerman's

The Incompetent Juror Issue.

Ostrer had previously litigated the issue of whether a letter written

(* CONTINUED FROM PREVIOUS PAGE)

credibility, is seen in the reactions of the Court below during the course of Hellerman's testimony on various subjects. For example, after testifying extensively on the Natco and Swiss trip incidents, Hellerman reached the subject of his claimed intention to make good on his promise, testified to at Ostrer's trial, to make \$100,000. restitution to the victims of his crimes. Judge Brieant showed his impatience with and disbelief in Hellerman's credibility in the following colloquy:

"Q: At the time you testified in the Belmont case, did you intend to make that full restitution to the tune of \$100,000?

"A: I still intend to.

"THE COURT: You want --

"THE WITNESS: I still intend to.

"Q: Have you set aside any of the proceeds of the advance for the book toward that end, sir?

"A: I told you I didn't get the proceeds.

"THE COURT: Who are you going to make this restitution to?

"THE WITNESS: Who physically?

"THE COURT: Yes. You say now you intend to make a restitution of \$100,000?

"THE WITNESS: Yes.

"THE COURT: To whom?

"THE WITNESS: I would go to somebody in Mr. Broderick's office...and ask them how it should be done....That is just the way I feel.

"Q: How long has your wife had the advance from the publisher?

* * * * *

"A: One part of the advance was given when the contract was signed.

* * * * *

"Q: Was any part of that money set aside for restitution?

"A: The money is still -- no."

(A. 1467-1468)

Judge Brieant obviously disbelieved Hellerman on at least some points, for the next day, while the Chief was on the witness stand, the following colloquy took place:

"Q: Are you aware to this day of any occasion Mr. Hellerman lied under oath in any of these trials or at any point?

"A: No.

THE COURT: You are not counting yesterday.

THE WITNESS: I wasn't here yesterday.

(A. 1531)

On one occasion the judge berated Hellerman for his lack of candor, in the following colloquy, while Hellerman was being questioned about his stated intention to pay the balance due of \$87,500. in restitution remaining

(CONTINUED ON NEXT PAGE)

after the verdict by a juror, one Geneva Rush, to one of the defendants at the trial, constituted sufficient evidence of her mental incompetence to qualify as a juror within the meaning and requirements of 28 U.S.C. 1865 (b)(4). Ostrer lost on that point on the ground that he failed to make a sufficient threshold showing in order to trigger an evidentiary hearing. United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974).

Now Ostrer has filed affidavits* alleging new evidence on two points. First, the affidavit of the juror's brother, Junius June Rush, shows that juror Rush was, indeed, incompetent at the time of the Ostrer trial. He talks about this sister's infatuation with "spiritualists" and of her quest

(* CONTINUED FROM PREVIOUS PAGE)

after the payment of the first \$12,500. installment that he testified at the Belmont trial had been made by that time:

"THE COURT: ..you see I am privy to something else. I know he didn't even pay the \$12,500. and I took the view that was not a proper matter to be brought out in this hearing....

* * * *

"THE WITNESS: I think your Honor is mistaken.

"THE COURT: You didn't pay the \$12,500. and you went to the Court and asked that that figure be reduced and it was and you knew that.

"THE WITNESS: I think --

"THE COURT: Those papers are under impoundment and I ordered they not be opened up because they don't have anything to do with Ostrer."

(A. 1469)

Thus, Judge Brieant, having had the benefit of knowing things about Hellerman that the jury did not know but should have known, expressed the view that Hellerman was a liar. Nevertheless, in his Findings, the Judge ventured the guess -- and it could only have been a guess, since Judge Brieant did not preside at the Ostrer trial -- that "our reading of that trial record suggests that he was a more careful witness then, than at the habeas hearing before me." (A. 341) Obviously, Hellerman is not easily believed once the finder of fact knows the full story. Judge Brieant wrongly assumed that a fully-informed jury would not have concluded that Hellerman's trial testimony was as far from being "careful" as was his testimony at the habeas hearing before Judge Brieant.

*See affidavit of Richard J. Maline at A. 215; affidavit of John McNally at A. 217; and affidavit of Junius June Rush at A. 219. Junius Rush also executed an affidavit filed by the Government (A. 223) which on some points appears to conflict with his earlier affidavit, and on other points seems to skirt a direct conflict. An evidentiary hearing would have been necessary to iron out these conflicts and apparent conflicts.

to "see the unknown". He noted a marked behavior change in his sister beginning in 1970.

Perhaps more critically, however, the Junius Rush affidavit revealed, for the first time, that during the trial, juror Rush was talking with two of her friends, "Bertha" and "Olive", at the juror's house, and the following conversation took place:

"This meeting took place at my sister's apartment during the time that my sister was sitting as a juror in the Ostrer trial. At this meeting, we all discussed the ongoing trial. My sister stated that 'the Italian' has a lot of money, and that 'the Jew' has a lot of money, and they must be guilty. Bertha also stated that they were guilty. Geneva then said something like 'I saw something in my eyes to indicate they are guilty.' I have heard Geneva use the phrase 'see with my eyes', or 'eyes opening' many times before, at which times she was discussing her spiritualism. Geneva thought that she had mystical powers with which she was able to see, know, and understand things that other people could not. She states at this meeting that she knew that the defendants were guilty. At one point she referred to the defendants as the 'Italian mobster and the rich Jew in cahoots with him'. Bertha expressed agreement with Geneva and said that Geneva had better not vote in their behalf. Geneva told me on that occasion that she talked with another member of the jury during the course of the trial."

(A. 221-222)

Surely this startling affidavit set out sufficient evidence both of the juror's instability and of interference with Rush's deliberation by two outside parties -- Bertha and Olive -- to have warranted an evidentiary hearing where, at least, juror Rush could have been called as a witness.*

Yet the Court below dismissed this request for a hearing with the following observation:

*Counsel could not obtain an affidavit directly from juror Rush, even though her brother knew of her whereabouts, because of an outstanding order of the Trial Court prohibiting counsel from seeking such an interview.

"Since petitioner has presented no new evidence in his current set of affidavits concerning Geneva Rush, which had not already been before the Court of Appeals in 1974, the Court declines to consider petitioner's motion to vacate sentence based on the claimed incompetence of this juror. This branch of the motion is cumulative, repetitious and untimely."

(A. 353-354, fn. 4)

It is clear that the Appellant's factual allegations are not cumulative nor repetitious, as they were presented in the instant motion for the first time. It is clear that they are timely, for, as the affidavits indicate, the juror's brother had just become available to Ostrer's investigators and counsel. This issue certainly has neither been dealt with nor disposed of by the prior proceedings and appeal.

ARGUMENT

Introduction.

This is a case in which the Appellant must prevail regardless of the legal standard applied in determining whether he has proven sufficient prejudice or miscarriage of justice to warrant the granting of a new trial. The Court below applied a significantly stricter standard than the law requires; yet even under a stricter standard, reversal of Ostrer's conviction is clearly required. When the correct standard is applied, reversal becomes such a foregone conclusion that argument is hardly needed.

This is a most unusual case on its facts, but the law is clear. Had the jury been privy to the information that was suppressed at the trial but which emerged at the evidentiary hearing and was found by the Judge at that hearing, most assuredly the kind of doubt would have arisen in the jury's mind to satisfy whatever burden and standard are cast upon the Appellant. It would be a severe comment upon the integrity of the judicial process to assume that a jury would not have been just as exercised over the extraordinary facts of this case as any Court must be. It defies belief to conclude that a jury, once having learned as much about Michael Hellerman as the Court below learned, would not have had its faith in his credibility seriously shaken.

- I. THIS CASE IS CONTROLLED BY THE SUPREME COURT'S RULING IN GIGLIO v. UNITED STATES -- A DECISION WHICH IS NOT DISTURBED BY THE SUBSEQUENT DECISION IN UNITED STATES v. AGURS.

The Supreme Court set out, in Brady v. Maryland, 373 U.S. 83 (1963), the obligation of the Government to disclose to a defendant's attorney evidence and material in the Government's possession that would tend either to exculpate the defendant or to reduce his degree of culpability or punishment.

The standards governing treatment of violations of the Brady obligations were further refined in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976). Agurs deals with the scope of the Government's Brady obligations and the appropriate standards for evaluating when a Brady violation rises to the level of a Due Process violation and requires that a conviction be vacated.

Although all Brady violations involve "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense", the Agurs Court perceived three "quite different" and distinct sub-classifications or groupings. Agurs, supra at 2397.* For each grouping, a different standard is set out for evaluating the materiality of the undisclosed evidence and for determining whether a new trial is required.

Category I, explained the Agurs Court, is "typified by Mooney [v. Holohan, 294 U.S. 103 (1935)]", a situation in which "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew or should have known of the perjury."

"In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair [citing, at n. 8, Pyle, Alcorta, Napue, Miller, Giglio, and DeChristoforo], and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury [citing Giglio quoting from Napue]....In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth seeking function of the trial process."

Agurs, supra at 2396 (emphasis added).

It is this "reasonable likelihood" test which should have been --

*In this brief, the three sub-classifications or groupings of types of Brady violations are referred to as Category I, Category II, and Category III, respectively.

but was not -- applied by the Court below.

At trial, the prosecutor elicited the following testimony from Hellerman:

"Q: Now, in accordance with that agreement or in any other one has the government promised that it will never prosecute you on all of the cases as to which you gave testimony yesterday?

"A: No.

"Q: Has the government made any representations or promises to you?

"A: Only what is contained in the agreement, sir.

(A. 969A)

The District Court concluded that this was not "perjury" because

"[b]oth Hellerman's attorney and the Government believed that [the written Memorandum of Agreement] did constitute his agreement with the Government,..."

and Hellerman could reasonably have taken the position that the fringe benefits he had received -- consent to the Swiss trip, \$80,000., etc. -- were merely the demonstrations of Government largesse, "outside his agreement to testify for the Government." "Perjury", the Court observed, "requires scienter." (A. 343, n. 16) Thus, the District Court declined to apply the "reasonable likelihood" standard.

Category I Brady cases are characterized by questions concerning the veracity of the Government's witnesses or other evidence presented as part of the prosecution's case. It is clear from the cases cited by Mr. Justice Stevens as supporting the principle of Mooney, that the term "perjury" is meant in a generic sense and that the false evidence did not have to rise to the level of statutorily-defined perjury.

Mooney reached the Supreme Court in that petitioner's motion for leave to petition for an original writ of habeas corpus. He charged that his conviction was obtained by perjured testimony knowingly used by the prosecuting authorities and that those "authorities deliberately suppressed

evidence which would have impeached and refuted the testimony thus given against him." Mooney at 110. The state's return did not contest any of the petitioner's factual allegations, but was rather in the nature of a demurrer. Although ruling that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" would violate the Fourteenth Amendment, the Court declined to consider the case on the merits, and directed the petitioner to the state courts where he could attempt to establish the truth of his claims. Mooney, supra at 112. Similarly, Pyle v. Kansas, 317 U.S. 213 (1942) arrived at the Supreme Court in the form of a pro se habeas petition alleging that the state authorities had presented testimony known to be perjured and had suppressed testimony favorable to the petitioner. Citing Mooney, the Court remanded the case so that the prisoner could present evidence on these matters which stated a claim for relief. Mooney and Pyle hold that if knowing perjury is proven, relief must be granted. But those cases do not hold that the petitioner must prove that the false testimony was actually perjury as defined in 18 U.S.C. 1621. If this were the rule, then a Government witness, with careful coaching perhaps from the prosecution, could proceed to testify in a manner which is literally true but designedly unresponsive, all with the deliberate intention of misleading the defense about the benefits that have been visited upon him by the Government. See Bronston v. United States, 409 U.S. 352 (1973). This would be a profoundly dangerous rule of law, and it is not at all dictated by the decisions in Mooney and Pyle.

None of the Supreme Court's decisions cited in Agurs as following the Mooney/Pyle principle purport to require that a defendant allege and prove that actual perjury tainted the Government's case. Alcorta

v. Texas, 355 U.S. 28, 31 (1957) speaks of the "general principles" of Mooney and Pyle which required reversal because the Government's witness had given the jury a "false impression". Similarly, Napue v. Illinois, 360 U.S. 264 (1959) speaks of the Government witness' "false testimony", not his "perjury".

Miller v. Pate, 366 U.S. 1 (1967) did not -- and could not -- involve perjury per se or even testimony which the witness believed to be untrue. Instead, it involved a very misleading exhibit. The prosecution introduced into evidence a pair of shorts which it claimed to be stained with the blood of the victim although it knew that the shorts were stained with paint. The prosecution also introduced testimony from a chemist whose expert qualifications were established and who testified that he had examined and tested the shorts and found human blood. Nothing in either the opinion of the Court of Appeals, 342 F.2d 646, 652-653, or that of the Supreme Court, indicates that this expert was either perjuring himself or knowingly testifying falsely about the presence of the blood. Indeed, at the habeas hearing the State did not dispute the defense chemist's testimony that he had examined the shorts and found that they were encrusted with mineral pigments commonly used for paints, "contenting himself with prevailing upon the witness to concede on cross-examination that he could not swear that there had never been any blood on the shorts." Id. at 5 (citation omitted). Thus, on the record considered by the Supreme Court, there was no finding of ^{either} further perjury or false testimony, but rather a finding that a prosecutor had allowed seriously misleading testimony and a seriously misleading exhibit to be presented to the jury, knowing all the while the true facts which would have cast the testimony and the evidence in a very different light. Mooney, the Court stated in Miller, had

held that Due Process cannot tolerate a "conviction obtained by the knowing use of false evidence....There has been no deviation from that established principle. Napue...; Pyle...; cf. Alcorn...." Id. at 7.

Finally, in Giglio v. United States, 415 U.S. 150 (1972), Chief Justice Burger, for a unanimous Court, ruled that (1) the failure of the Government to disclose a promise made to its key witness that he would not be prosecuted if he testified as a Government witness, and (2) its further failure to correct his testimony denying such an agreement, and finally (3) its proceeding to argue this false testimony to the jury* were Due Process violations requiring a new trial.

"As long ago as Mooney...(1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle....In Napue ...we said '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' ...Thereafter Brady...held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'...When the 'reliability of a given witness may well be determinative of guilt or innocence' nondisclosure of evidence affecting credibility falls within this general rule....

Id. at 153-154.

This case is directly controlled by Giglio.**

*As in Giglio, one need not label the Belmont trial prosecutor as a deliberate malfactor in order to fault the United States Attorney's Office -- the unitary "Government" -- in allowing Ostrer's conviction to be obtained with the use of false testimony. The Chief's failure to circulate a memorandum concerning the \$80,000. story so that each assistant trying a case involving Hellerman could make full disclosure to the defense is, given the circumstances, not surprising.

**The final case cited in the Category I footnote in Agurs is Donnelly v. DeChristoforo, 416 U.S. 637 (1974), in which the Court found that a prosecutor's remark in summation was ambiguous so that the Government could not be charged with making a misrepresentation which was likely to have affected the jury's judgment.

One Supreme Court decision not mentioned in the Giglio footnote in Agurs is DeMarco v. United States, 415 U.S. 449 (1974) a brief unsigned

(CONTINUED ON NEXT PAGE)

The lower courts* which have had occasion to rule on post-Agurs claims

(* CONTINUED FROM PREVIOUS PAGE)

per curiam opinion. In DeMarco, a Government witness, indicted with DeMarco "testified that the Government had made no promises to him with respect to the disposition of his case." Id. at 449. Later at the witness' sentencing hearing, the prosecution made representations which could be interpreted as meaning that these disavowals had been false. Since the issue was first pressed by DeMarco in the Court of Appeals, the Supreme Court remanded the case with instructions that the case be returned to the District Court for fact-finding on the question of whether the apparent plea agreement with the witness was entered into after or before DeMarco's trial. The Court observed, at 450, that "[u]nquestionably, had there been a promise to the witness prior to his testimony, Giglio...and Napue...would require reversal of petitioner's conviction."

What was discovered upon remand to the District Court would also "unquestionably" have led the Supreme Court to reverse had the record included the facts later uncovered at an evidentiary hearing. At that hearing, the prosecutor in the case testified that he had struck a deal with the witness' counsel and that "he had entered into this agreement with the three attorneys...with the understanding that [they] would not inform their clients, so that the clients would testify without knowledge of the promises and could truthfully answer in the negative the inevitable question concerning promises." United States v. Pannos et al., N.D.Ill., No. 70 CR 469 (July 23, 1974), at 4. Thus, there was no perjury at trial. Needless to say, the Court found that Due Process was violated.

*It appears that the first reported Federal decision citing Agurs was in this Circuit. In Moynahan v. Manson, 419 F.Supp. 1139 (D.Conn. 1976), affirmed without opinion 559 F.2d 1204 (1977), petition for cert. filed September 13, 1977, 46 U.S.L.W. 3264, Judge Blumenfeld dealt with a classic Giglio situation. The main witness against Moynahan was one Miller who testified that "no offers had been made to him", "that he had not been the subject of an investigation" concerning crimes (a stolen goods/fencing ring). The Government argued to the jury that "no pressure had been brought to bear" on him. The truth of the matter -- known to the State -- was that an "offer" of no prosecution was at least implicit in the suggestions made by police during the course of Miller's interrogation, that he (Miller) was clearly implicated as a possible target defendant in the fencing ring, and that he was told that the authorities wanted to "square away Ed Miller," and "[o]therwise, we're going to have to start looking at Ed Miller a little stronger...You follow me, Ed?" Id. at 1146, n. 20.

The Court, although referring to the rulings in Napue and Giglio, failed to recognize that those rulings survived Agurs intact and that once a Giglio/Napue violation is shown, a new trial must be ordered "if there is any reasonable likelihood that the testimony could have affected the judgment of the jury." Agurs at 2397. Instead, the Court in Moynahan confused the Agurs categories and held that, because the defense had not specifically requested exculpatory evidence which was related to Miller, "the standard [to be applied] is whether, had [the defendant] been able to present the withheld evidence to the jury, [would it] have created a reasonable doubt

(CONTINUED ON NEXT PAGE)

in Category I cases have, for the most part, correctly analyzed those claims and applied the Giglio standard, for Agurs alters the law not one whit when the Government's case is tainted by false evidence, known to it and not disclosed to the defense.

The paradigmatic case, of course, is a Giglio situation in which the Government's key witness testifies falsely about prosecutorial favors and inducements.

This appeal squarely presents that paradigmatic case, and it presents for decision the precise question which was not reached -- but was recognized -- in this Court's opinion in Brach v. United States, 542 F. 2d 46 (1976). In Brach, this Court observed that "the thrust of the Agurs majority view is that the unqualified finding of the trial judge that the respondent was indeed guilty was enough to defeat the motion for a new trial." In Brach, the petitioner had claimed that his conviction should be vacated because the Government had suppressed evidence helpful to him. Finding that this evidence failed to meet even the pre-Agurs standard for materiality, the Court found it did not have to rule upon the issue of "how far a rule requires the raising of a reasonable doubt as a condition to granting a new trial would apply in a case where the credibility of a single prosecution witness was dispositive...." Id. That issue is presented squarely in this case.

(³ CONTINUED FROM PREVIOUS PAGE)

that did not otherwise exist. United States v. Agurs...." Id. at 1145. Even under this more stringent standard of materiality, the Court found that due process was violated: "It does not require an unusually agile imagination to tie Miller's testimony to his personal freedom...." Id. at 1147. (Judge Blumenfeld has, by now, apparently recognized that his Agurs application in Moynahan was inappropriate; see United States ex rel. Annunziato v. Manson, 425 F.Supp. 1272 (D.Conn. 1977), C.A. No. 77-2017 [argued September 16, 1977], discussed infra at 55-56).

The Fourth Circuit has correctly decided that Giglio stands unchanged by Agurs.

In United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976), the Court vacated the defendants' convictions for conspiracy to rob a bank. The state's circumstantial case turned into an "overwhelming case" by testimony from a witness, one Cannon, who claimed that the defendants had borrowed his car with the stated purpose to "stick up a place". The prosecutor argued to the jury that they should believe the witness, in part because no one had threatened him.* But at a post-trial hearing, an F.B.I. agent testified that, in interviewing the witness, he had falsely accused Cannon of complicity in the crime "as an inducement to Cannon to give the complete story." The Court of Appeals' consideration of whether a new trial was required was guided by its reading of Agurs which it judged to "[require]...that we distinguish between what may be termed 'veracity' (or perjury) cases and cases involving 'discovery' of evidence known to the prosecution but not involving prosecutorial misconduct or corruption of the truth-finding process. Giglio...was a veracity.... Agurs, on the other hand, may be viewed as a 'discovery' case." Id. at 1241-1242.**

Thus, the Sutton opinion drew the proper distinction between (1) a case in which the Government fails to disclose its own promises to its own

*Similarly, in the case at bar, the prosecutor's argument to the jury, in light of the suppressed facts, was highly misleading at the very least. See discussion and analysis of the closing arguments by all counsel in the factual statement of the case, supra.

**The undisclosed evidence in Agurs was the murder victim's criminal record for assaultive conduct. Although such information could have served to bolster the defendant's contention that she acted in self-defense, it did not impugn the veracity of the Government's proofs.

key witness and allows that witness to testify falsely on a matter which goes directly to his credibility (that is, motive and bias) and (2) the "rather typical contention that the government possessed information... which it should have produced" but which does not bear upon the veracity of any of the prosecution witnesses. The Court correctly concluded that "the Agurs standard is inapplicable in the Giglio-type situation with which we are presented in the present case, i.e., where a false statement intended to shore up the credibility of a witness has been made at trial." Id. at 1242.

Even in the face of a partial admission by Cannon during the course of cross-examination concerning the thrust of the agent's interrogation, the Court said that, "as in Napue..., the prosecution [had] allowed a false impression to be created at trial when the truth would have impugned the veracity of its key witness." Id. at 1243. The convictions were reversed.*

The Fifth Circuit's decision in Blankenship v. Estelle, 545 F.2d 510 (1977), is to the same effect** -- and even more emphatic in its holding that the prosecution is under a duty to correct not only its witnesses' perjury but also an "erroneous impression" which could mislead the jury about the existence and scope of any Government deal with the witness.

Blankenship had been tried as an accomplice to an armed robbery. The

*In Norris v. Slayton, 540 F.2d 1241 (1976), the Fourth Circuit, in an opinion somewhat inconsistent with its later reading of Giglio and Agurs in Sutton, ruled that the state's failure to disclose a police report containing a description of the victim's reticence about identifying the defendant at her first confrontation with him warranted a new trial. Thus, Giglio was read to include non-disclosure of a Government witness' prior inconsistent statements as well as prosecutorial threats, favors, and inducements. Cf. Cannon v. State of Alabama, 558 F.2d 1211 (5th Cir. 1977).

**The Third Circuit has intimated that it, too, would rule similarly.

State's witnesses included two participants in the actual robbery, who testified that Blankenship had planned the crime and that they had carried it out because they feared him. "Only their testimony directly linked petitioner to the crime and the State's 'corroborating' evidence was slim." Id. at 512. The prosecution elicited from both its witnesses testimony that they themselves were under indictment for the robbery. Id. at 513. After trial, the defendant discovered information which seemed to indicate that the State had an agreement with the two witnesses whereby the charges against them would be dismissed in exchange for their testimony against Blankenship. The Court of Appeals ruled that, if the petitioner's claims were shown to be true, then the case fell "squarely within the Giglio rule" and Blankenship would be entitled to a new trial.

"Although in the instant case the testimony that Brooks and Crawford were 'under indictment' may have been technically true, it left the erroneous impression of an impending trial and the absence of leniency as an inducement to testify. This court has recently made clear that we will not tolerate prosecutorial participation in technically correct, yet seriously misleading testimony which serves to conceal the existence of a deal with material witnesses."

Id. (emphasis supplied)*

(* CONTINUED FROM PREVIOUS PAGE)

In United States v. McCrane, 547 F.2d 204, 205-206 (1976) ("McCrane II") that Court of Appeals, reconsidering its opinion in "McCrane I", 527 F.2d 906 (1975), vacated and remanded for further consideration in light of Agurs, ___ U.S. ___, 96 S.Ct. 3197 (June 20, 1976), observed that it was questionable whether Agurs altered the Giglio standard "when only impeaching evidence is under scrutiny," citing both Sutton and Brach. In view of the Supreme Court's remand for consideration of the impact of Agurs, however, the Court proceeded to review the case using the Agurs Category III standard -- and found, again, that the conviction must be reversed.

*The Court cited its earlier decision in Dupart v. United States, 541 F.2d 1148, 1150 (1976) -- also decided after Agurs -- which firmly rejected the contention that the Giglio/Napue principle applies only to cases in which there is actual perjury: "a formalistic exchange of testimony [concerning

(CONTINUED ON NEXT PAGE)

In this Circuit, in a case now pending before this Court, Judge Blumenfeld, in a thorough and thoughtful opinion, surveyed in Annunziata, supra, the state of the law in this area. That opinion recognizes that the Supreme Court reaffirmed, in Agurs, the vitality of Giglio, Annunziata, at 1278, n. 16,* and proceeded to apply Giglio with full force to the habeas proceeding brought by Annunziata once he discovered that the key witness against him, Pino, who at trial had denied any "deal", testified in another case that he had indeed made such a deal with the authorities. At Annunziata's trial, as at Ostrer's trial, the prosecutor elicited testimony on redirect examination that "left the impression that all of the government's promises had been revealed and fulfilled." Id. at 1278. This testimony "was false, even bordering on perjury", and "the state should have known of its inaccuracy." Id.**

(* CONTINUED FROM PREVIOUS PAGE)

the nature of the witness' not having a 'case' pending against him] even though not technically perjurious, would surely be highly misleading to a jury..." It is difficult in the case at bar to see Hellerman's trial testimony about the favors done for him by the Government as anything but false, but if one chooses (as the Court below apparently did) to see it merely as "technically" incorrect, it still is clear that the testimony was "seriously misleading testimony which serve[d] to conceal the existence of a deal with [a] material witness...."

*Another District Court opinion in this Circuit has, in passing, observed that the rule of Category I cases is not disturbed by Agurs. In Leyva v. Superintendent, Green Haven Correctional Facility, 428 F.Supp. 1 (E.D.N.Y. 1977), the Court dealt with a claim that the petitioner's conviction was obtained through the knowing use of perjured testimony and recited the general Category I principle that "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" the conviction must be vacated, citing Napue. Id. at 2, n. 1. The Court did not reach the merits of Leyva's claim, however, because the petitioner had not exhausted his state remedies.

**Exacerbating the Brady violation in Annunziata was the fact that the prosecution had successfully objected at trial to defense counsel's attempt to inquire into the status of any pending charges against Pino, claiming that arrests without convictions were not proper matters with which to impeach the witness' credibility. In the case at bar, Ostrer's trial counsel complained of just such a limitation on the defendant's confrontation rights in his motion for a new trial. (A. 97-100)

The Court took particular note of the fact that certain of the charges against Pino were still hanging over his head at the time of his testimony at Annunziata's trial and, had the jurors known of this pending exposure to prosecution, they might well have considered Pino's motive in testifying quite differently. Id. at 1276. In the case at bar the Government did not enter a nolle prosequi as against Hellerman in the Natco prosecution until October 12, 1973 -- well after his testimony at Ostrer's trial. And, of course, Hellerman was never charged at all for his role in absconding with the \$80,000. which the Government assisted in putting into his pocket in the waning days of the Natco "bust out".*

The Government's (1) failure to disclose the \$80,000. Natco theft, the non-opposition to the Swiss trip, and the attorney's fee reduction, (2) failure to correct Hellerman's testimony that his entire deal with the Government was disclosed in the "Memorandum of Agreement", (3) objections to defense counsel's so much as analogizing the Government's treatment of Hellerman with "buying" a witness' testimony, and (4) its arguing to the jury the truthfulness of this testimony (which was probably perjurious, but certainly highly misleading), place this case directly under the Giglio rubric. There certainly is a "reasonable likelihood" that the undisclosed information might have affected the jury.

Ostrer's conviction must be vacated.

*Hellerman and the Chief kept up the pretense, right up until the end, that the Chief was serious in his threat that if Hellerman used the Natco funds for his personal ends, the Chief would see to it that he was prosecuted to the fullest extent of the law. The Court below did not credit the claimed seriousness of this threat, and called it "obviously a paper tiger". (A. 321) Thus, despite Hellerman's trial testimony that he did not expect to be prosecuted on any indictments other than the three to which he had pled guilty pursuant to his written agreement with the Government, it is clear that the theft of the \$80,000. was or should have been hanging over his head at least technically as a threat, especially since the Memorandum of Agreement oddly enough failed to mention Natco as one of the frauds on which the Government agreed not to prosecute Hellerman. (A. 320)

- II. EVEN IF THIS CASE IS NOT CONTROLLED BY GIGLIO v. UNITED STATES, THE CONVICTION MUST BE VACATED BECAUSE THE GOVERNMENT DID NOT RESPOND FULLY TO A SPECIFIC DEFENSE REQUEST FOR EXCULPATORY MATERIAL THAT PUT THE GOVERNMENT ON NOTICE AS TO WHAT WAS DEMANDED. INDEED, THE GOVERNMENT INTENTIONALLY SUPPRESSED CRUCIAL EVIDENCE OF ITS DEALINGS WITH ITS KEY WITNESS.
-

The Court below found that the defense* "specifically requested that the Government make available any material bearing adversely on the credibility, character or reputation of Hellerman." (A. 344) That request quite pointedly sought

"...any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government."

(A. 345)

Furthermore, the Government, in its submission in response to the defense motion making the Brady request, acknowledged its

"aware[ness] of its continuing obligation under Brady v. Maryland, 373 U.S. 83, 87 (1963) and related cases to inform the defense of exculpatory matter, including material bearing adversely on the credibility of Government witnesses. We will be prepared to meet those obligations fully and fairly as to Hellerman...." **

*During the course of Ostrer's trial, the Trial Judge urged the attorneys for both defendants to try to avoid duplication of each other's efforts, and counsel agreed to do so. Thus, for example, the Trial Judge agreed that an objection stated by one counsel would be considered to be an objection by both counsel, unless otherwise specifically stated. (A. 969) Consequently, the Court below noted that "any request by either defendant inured to the benefit of the other." (A. 360) In any event, it is not important for purposes of Agurs analysis which attorney made the more specific request for Brady material. The fact is that a specific request was made and the Government was placed on notice as to what material it had to search out and disclose to the defense.

**Government's memorandum of law in connection with motion for discovery, filed December 20, 1972. The Government did not even meet its continuing obligation after the verdict -- an obligation that binds the Government in this Circuit. See United States v. Rosner, 516 F.2d 269, 281-282 (2d Cir. 1975). See also United States v. Ott, 489 F.2d 872 (7th Cir. 1973) and American Bar Association, Standards Relating to the Prosecution Function §3.11.

The Government's "continuing obligation" was not met, and the shocking revelations discussed in the Findings of the Court below did not come to Appellant's attention until the fortuitous publication of Wall Street Swindler.

Despite its finding of a specific Brady request and the Government's failure to disgorge the information, and despite its ruling that this is a "Brady type case" (A. 345), the Court below inexplicably failed to apply the Category II materiality standard -- that is, whether the undisclosed evidence "might have affected the outcome of the trial." Agurs at 2398 (emphasis added). Instead, the Court proceeded to apply the Category III standard for cases, as exemplified by the situation in Agurs itself -- that is, whether the undisclosed evidence "probably would have affected the outcome of the trial [in] that it creates the reasonable doubt that did not otherwise exist." (A. 346, referring to Justice Marshall's dissent in Agurs at page 115) (emphasis added by the District Court).

This is obvious error. The difference between "might have been affected" and "probably would have affected" is so clear as not to require argument or citation.

Surely the extraordinary facts -- most particularly the Natco maneuvering -- now known, "might have affected" the jurors if they, too, had known the full scope of Hellerman's almost symbiotic relationship with the prosecution.*

The Court below dismissed these new facts as merely cumulative to the abundant evidence at trial concerning what a "rotten" person Hellerman was (or, in the Government's presentation, had been).**

*The District Court, having found the facts surrounding the Natco matter, immediately asked itself, "What are we to make of this bizarre story?" (A. 317)

**See A. 39-49 for a listing of misdeeds to which Hellerman admitted at the Belmont trial. The course of the proceedings thus far in the instant \$2255 case are somewhat reminiscent of United States v. Todaro, 550 F.2d 1300 (2d Cir. 1977)!

To a jury, however, the new matters would have been critical in its evaluation of the Government's case -- that is, its evaluation of Hellerman. The impeachment of Hellerman at trial had consisted of the witness' prior criminal activity and the terms of the executed Memorandum of Agreement. This impeachment was a garden variety of attacks on Hellerman's credibility by showing his unsavory prior character and conduct. The undisclosed evidence, on the other hand, is impeachment material of an entirely different order. It concerned the witness' motive and bias, the extent of his indebtedness to the Government, and the degree of his closeness to the Chief. Would you believe someone who has been paid by the Government with \$80,000. of stolen funds, the jurors would be asked. Would you place any reliance on the Government's vouching for his credibility? The former type of impeachment material, when hidden from a cross-examiner, may be harmless. The latter cannot. Davis v. Alaska, 415 U.S. 308 (1974).*

The critical nature of the undisclosed impeachment matter is highlighted by the fact that, at the time of the Belmont trial, Hellerman's prior criminal activity no longer posed a threat to his freedom. The benefits incorporated in his written agreement with the Government had already been conferred on him. His plea had been entered and the recommended (and expected) sentence imposed. Therefore, the only threat to his freedom at the time of trial lay in the undisclosed maneuverings with the \$80,000. for

*Similarly, in United States v. Alvarez-Lopez, 559 F.2d 1155, 1160 (9th Cir. 1977), the Court held that, although a witness' prior arrests are inadmissible for general impeachment purposes, a recent arrest where adjudication is still pending may be introduced to establish a motive for bias on the witness' part. There, as in Davis, the Court held that cutting off this line of cross-examination violates a defendant's confrontation rights and requires a new trial even in the absence of any showing of prejudice. The Court took note that "[e]specially should great latitude be allowed when, as here, the key prosecution witness is also a professional informant." See also Annunziata, supra.

which Hellerman had not even been indicted.* Knowledge of this state of affairs clearly would have enabled the defense to establish a present motive for Hellerman to testify at the Belmont trial in a manner which would please the Government by giving it another series of convictions.

The case law requires that when a defendant is denied material necessary in order to cross-examine a witness concerning his bias or motive to testify, a new trial is required. Yet affirmance of the ruling of the Court below in the case at bar would let stand a conviction where the withheld material was necessary in order to cross-examine the key Government witness concerning his motive to testify falsely. Such a ruling would create a dangerous anomaly in the law. The Government's incentive to fail to make full disclosure would increase precisely as the importance of disclosure in the truth-finding process increases.

The second major distinction between the nature of the evidence suppressed and that produced for defense counsel at trial lies in the very special status accorded pecuniary incentives in both law and long-standing social practice. The Court below overlooked entirely the fact that the impeachment material of Hellerman disclosed at trial fell into two major categories -- leniency as to prosecution and sentence, and a catalogue of prior crimes, while the suppressed material fell into two entirely different categories -- financial incentives accorded to Hellerman, and crimes committed jointly by Hellerman and the Government. Both of these latter categories were worthy of con-

*By the Chief's own testimony, what Hellerman did with the \$80,000. in Natco funds was something that the Chief, as the Court below found, had promised Hellerman he would prosecute him for! (A. 321, 1640-1641) Without belaboring the peculiar facts of the final Natco heist, the record is clear that there is no other reasonable conclusion than that the Government was well aware, prior to the Belmont trial, of both Hellerman's and its own roles in that caper. The latter's role probably explains more fully than the former's why this devastating information was never disclosed until Hellerman slipped out the word in his memoirs.

sideration by the jury.

The Court below stated its view that "there is no essential difference between pecuniary benefits which are given in exchange for testimony and benefits in the form of freedom from prosecution." (A. 347) The Court went so far as to theorize that

"In fact, it might be argued that the benefit of less time in prison is far more valuable than a mere cash benefit to a fellow who never had any trouble getting money."

(A. 347)*

The District Court is also wrong in its ruling that the suppressed evidence of the Natco caper was not "substantively different from that revealed at trial" because the "Government's willingness to close its eyes to Hellerman's appropriation of the \$80,000. has not been shown to have been a negotiated benefit in exchange for Hellerman's testimony." (A. 347) No

*This observation ignores several important realities. First of all, a juror earning, say, the minimum wage of \$1.60 per hour in January 1973 who would have had to work 28½ years to earn what Hellerman was permitted to steal, might not have considered \$80,000. the "mere" cash benefit seen by the Court below. Second, while in the past Hellerman "never had any trouble getting money", he was now a convicted felon, with a new identity, under the watchful eye of the Government, barred by the SEC from the securities business (A. 348), and (he claimed) an assassination target of the mob. Such a fellow is no longer in a position to earn the sums that Hellerman had become accustomed to. Third, while jurors were accustomed to hearing and reading about plea bargains where the Government gave the witness a reduced sentence or no sentence at all (Hellerman did get, after all, a two year prison sentence -- not likely to be seen as a mere slap on the wrist by the jurors), they were not likely to have come to blithely accept a deal where the Government paid for testimony with stolen funds. Finally, it appears that money was more important to Hellerman than avoiding a moderate period of deprivation of freedom. After all, when he went to the Chief to report, for the first time, his role in the ongoing Natco bankruptcy fraud, he was jeopardizing his freedom from prosecution under his prior oral agreement by confessing to a crime. He took that risk, however, in order to beat Sammy Feet to the \$80,000. prize. Hellerman was fortunate, of course, that the Chief, rather than rebuke or arrest him for the Natco fraud, helped him in the final "bust-out".

rule of law requires that a Governmental benefit be proven to be both negotiated and specifically understood to be a quid pro quo for testimony before it becomes Brady material. If this were the law, then the Government could completely evade its Brady obligations merely by telling witnesses that certain favors and concessions were not and should not be considered as given in return for testimony, but, rather, as evidence of the Government's "largesse".*

The case law in this and other Circuits, as well as at the Supreme Court level, uniformly looks with great suspicion, disdain, and outright disapproval on undue financial incentives given to Government witnesses -- a kind of treatment not given in the case law to plea bargains for lenient treatment. Thus, in United States v. Franzese, 392 F.2d 954, 963 (2d Cir. 1968), this Court evinced shock at a financial incentive being given to a witness even with Court approval and when disclosed to the jury.**

*The District Court's error is perhaps most dramatically highlighted by the situation in United States v. Badalamente, 507 F.2d 12 (2d Cir. 1974), cert. denied 421 U.S. 911 (1975). Before the trial, a critical witness against the defendant -- a witness who had been indicted in one case but who had not been formally charged or prosecuted at all for any role in the Badalamente prosecution, although, by his testimony he could well have been named as a co-conspirator -- had written a District Judge that he was being "terrorized" by an Assistant United States Attorney who was insisting that he tape and entrap various persons "or he will crucify me" by naming him in "'frivolous indictments.'" Id. at 17, n. 1. The letters showed that the witness "was either under extreme pressure from the United States Attorney's office to testify, whether truthfully or not, or that he was either a liar or deranged." Id. at 17, citing the defendant's brief on appeal. The letters were statements by the witness made before he had even agreed to testify at all. They could hardly constitute evidence of a tit for tat agreement between the witness and the prosecution. But this Court had no difficulty in finding the letter was Brady material and should have been disclosed to the defense.

**In Franzese, \$9,800. of the proceeds of a robbery were returned, upon Court order, to a Mrs. Codero -- the wife of one of the robbers, a man who became a Government witness. This peculiar maneuver "was fully before the jury" at trial. Id. at 963. Although the Court of Appeals "[confessed] that the Government's attitude strikes us as rather complaisant", it saw "no basis for invoking our supervisory powers when the Government submitted the issue to the trial judge..." Id. In contrast to the disclosures made in Franzese, the curious disposition of the Natco monies in the case at bar was neither presented to the District Court for approval nor presented to the jurors at the Belmont trial.

Similarly, Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), cert. denied 381 U.S. 950 (1965) -- the celebrated contingent fee informer case -- certainly reflects robust suspicion of supplying "cooperating witnesses" with cash. The Government's informer was paid \$10. per day plus gas and \$200. for purchasing illicit whiskey from each of two of the named suspects and \$100. for a purchase from another suspect. The Court found this arrangement inherently suspect.

"Such an arrangement might tend to a 'frame up,' or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration."

Williamson at 444.*

Recently, the Supreme Court echoed this theme in Connolly v. Georgia, ___ U.S. ___, 97 S.Ct. 546 (1977), the Court found that a Georgia statute authorizing the payment of \$5. to a justice of the peace for issuing a search warrant while providing for no fee if the warrant fails to issue, violated the Fourth Amendment requirement of "a neutral and detached magistrate." Citing Tumey v. Ohio, 373 U.S. 510 (1927) and Ward v. Village of Monroeville, 409 U.S. 57 (1972), the Court found that

"this situation, again, is one which offers 'a possible tempta-

*More recently, the Fifth Circuit refused to upset conviction obtained through the testimony of an undercover agent who received a \$15,000. payment after the verdict was returned. The Court relied upon a finding that the agent "had had no expectation whatsoever of receiving the sum awarded by the DEA and it was only given to him, upon the recommendation of Agent Short, after the convictions had been obtained." United States v. Marsi, 547 F.2d 932, 937 (5th Cir. 1977), cert. denied 22 Cr.L.Rptr. 4037. Would the result have been different if the agent had been awarded \$80,000. for his efforts prior to his testimony? As Judge Friendly has noted, a Court must feel some "frustration [in] trying to draw lines between permissible and impermissible forms of undercover activity" and perhaps the only "rule" is that "'there comes a time when enough is more than enough -- it is just too much.'" United States v. Archer, 486 F.2d 670, 677, n. 6, quoting Judge Brown's concurring opinion in Williamson, supra at 445.

tion to the average man as a judge...or it might lead him not to hold the balance nice, clear and true between the state and the accused."

Connolly at 3642.

If payment of only \$5. creates "a possible temptation", surely a lump sum payment of \$80,000. was a possible enticement to Mr. Hellerman "not to hold the balance nice, clear and true between" truth and falsity.*

The Code of Professional Responsibility reflects the same concerns.

Canon 7 and Ethical Consideration 7-28 provide, inter alia, that

"Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert....

"It will not do for an attorney who seeks to justify himself against charges of this kind to show that he has escaped criminal responsibility under the Penal Law, nor can he blindly shut his eyes to a system which tends to suborn witnesses, to produce perjured testimony, and to suppress the truth. He has an active affirmative duty to protect the administration of justice from perjury and fraud...." [citations omitted]

As has been noted above, the revelation of the written plea bargain alone should have shocked no one on the jury. The Supreme Court has approved "[d]isposition of charges after plea discussions" as "not only an essential part of the [criminal] process but also a highly desirable [practice] for many reasons."** Yet the Court has never spoken approvingly of bonanza cash payments to cooperating witnesses.***

*After all, one must bear in mind that in the case at bar, the difference between testimony that would exonerate Ostrer and testimony that would inculcate him was such that a witness not holding this balance could easily testify that Ostrer knew the one critical criminal element -- that the stock he invested in was manipulated.

**Santobello v. New York, 404 U.S. 257, 260-261 (1971).

***Such a practice cannot be justified by any of the rationales which, in the Court's view, support plea bargaining -- speedy dispositions, limiting

(CONTINUED ON NEXT PAGE)

Various regulations and publications of the Government itself indicate the clear distinction between financial incentives and the propriety of other kinds of incentives. For example, a recent Government publication directed to prosecutors' offices entitled Improving Witness Cooperation* contains brief mention of the problem of "adequate witness fees and payment procedures" (at 32). It counsels prosecutors to

"encourage the passage of legislation or promulgation of regulations that would permit payment of witnesses each time they were required to appear before the court or other law enforcement body."

It urges that these fees "should be at least as high as the minimum wage scale or higher if possible", and that

"[p]ayment should be prompt and the related procedures uncomplicated. For those in particular need, provision could be made for expeditious cash payment, while the other witnesses would be paid by check."

Ironically, and quite to the point in the case at bar, the Department of Justice, apparently having experienced problems with the unseemly appearance (especially to juries) of protected witnesses, such as Hellerman was, receiving unduly large cash benefits from the Government, promulgated a series of four strict directives governing payment of monies to witnesses

(*** CONTINUED FROM PREVIOUS PAGE)

pre-trial confinement, the protection of the public from likely recidivists on bail, and the enhancement of a defendant's rehabilitative prospects. In fact, the Government's behavior in the Natco caper and the Swiss trip served precisely the opposite ends: during the period of his awaiting sentence while at liberty, Hellerman was allowed to prolong his criminal activities with Government assistance, the Natco creditors were bilked, these and other Hellerman victims may well have been deprived of any opportunity to recover funds from Hellerman as the result of the Swiss trip and what may have transpired on that swing through the Continent.

*Cannavale and Falcon, Improving Witness Cooperation: Summary Report of the District of Columbia Witness Survey and a Handbook for Witness Management (United States Department of Justice, National Law Enforcement and Criminal Justice Law Enforcement Assistance Administration, 1976).

in the Witness Protection Program.*

The first such directive, promulgated by then-Deputy Attorney General Kleindienst in 1969, provided that "expenses of maintenance of a witness and a family member shall be limited to ordinary living expenses...." Average dollar amounts on a per diem basis were provided, and exceptions to these limitations had to be approved by "the Assistant Attorney General for Administration, upon recommendation of the Assistant Attorney General involved...." (Addendum 1, p. 2, ¶2)

The next directive in March of 1971, admonished that "no U.S. Marshal shall disburse funds to a witness or incur expenses without written authorization." (Addendum 2, p. 2, ¶6(B)). The directive goes on to specify the following maximum allowances for witnesses:

"Payments for maintenance up to \$35 per day for less than 30 days, or \$1,000. per month, may be authorized by the Director, U.S. Marshals Service, or his designee. Requests for maintenance in excess of \$36. per day or \$1,000. per month shall be submitted to the Assistant Attorney General for Administration for approval. To the extent practicable the U.S. Marshals Service shall adhere to the following guidelines authorizing payments within the foregoing maximums for maintenance:

"(1) Motel - For emergency cases.

"(A) Actual cost at as reasonable rate as possible, up to \$20 per day.

"(B) Meals and Incidentals - \$8 per person per day.

* * * * *

"(5) Food and Incidentals in other than Motel - \$6 per day for first person, \$8 for two, and \$10 for three or more.

* * * * *

"(7) Telephone Expense.

"(A) Motel - Local telephone; no long distance calls.

*These four directives are contained as Addenda to this brief. They are dated March 27, 1969; March 15, 1971; December 15, 1971; and January 10, 1975. Thus, three out of the four directives were promulgated prior to Ostrer's trial and, quite clearly, were supposed to regulate Government treatment of all protected witnesses. In any event, it would seem that the admonitions in and policy judgments behind these directives should have applied with equal force to all cooperating witnesses, whether protected or not.

"(B) Military Residence - Class B telephone; no long distance calls.

* * * * *

"(9) Other Expenses - Up to the maximum daily or monthly allowance or...payment of other items necessary for the adequate maintenance of the witness. ..."

(Addendum 2, pp. 5-6)

Similar limitations are contained in the directive of December 1971

(Addendum 3).

Anyone with any experience in the defense of criminal cases well knows the myriad uses to which such a series of official directives could have been put at Ostrer's trial -- had defense counsel known of the monetary incentives given Hellerman -- in examining not only Hellerman, but in examining the Chief as well, who surely would have been called to the stand as a defense witness. In fact, had counsel known of the existence of this material while this case was still within the jurisdiction of the Court below,* presentation of the directives to that Court might well, alone, have produced a different ruling on the merits of Ostrer's motion to vacate sentence.

Thus, the Court below missed the mark in concluding that the payment to Hellerman might in some odd way be mitigated because it was "merely one facet of the Government's broader program to guarantee Hellerman's safety rather than as an effort to put cash in his pocket." (A. 348) Even assuming that the \$80,000. item was meant for such purpose, it would have had to be approved by the Assistant Attorney General as an expense necessary for the witness' protection. Given the fact that the Chief was unsuccessful in getting official government funds for Hellerman to pay off the loan sharks, it

*These directives have not been published in the Federal Register or Code of Federal Regulations. Counsel became aware of them for the first time only upon reading about them in a recently published book, The Alias Program, by Fred Graham (Little, Brown & Co., 1977).

is clear that such a sum would not have been approved under the Witness Protection Program or any other program. Besides, even if such an outlandish payment were approved for such an outrageous purpose as paying loan sharks, the Government could not have authorized the payment to Hellerman be made with funds belonging to Natco and its creditors! In any event, payments like this are simply not made by the United States to its citizens, regardless of how public spirited they might be in aiding the pursuit of criminals.*

Subsistence payments to witnesses requiring protection has been recognized as a valid governmental practice authorized under 28 U.S.C. 524.** See United States v. Librach, 536 F.2d 1228 (8th Cir. 1976). However, Congress, in enacting this statute, could hardly have meant to authorize the appropriation of an \$80,000. advance payment for one witness.*** Obviously,

*The general federal bounty statute authorizes appropriations up to \$25,000. as a reward for supplying information leading to the arrest or capture of any one person charged with violating federal law. These sums are "to be apportioned and expended in the discretion of the Attorney General of the United States." 18 U.S.C. 3059. See also 20 U.S.C. 886, 18 U.S.C. 1751(g), and 39 U.S.C. 404(a)(8). Even assuming that the officials in charge would have authorized a payment to Hellerman, and even assuming that -- during the course of his career as an informant and witness -- Hellerman nabbed enough persons to warrant an \$80,000. "reward", the statute hardly authorizes a payment such as the one in this case.

**That statute provides that
"Appropriations for the Department of Justice are available for payment of---(1)...expenses of witnesses and informants, all at the rates authorized or approved by the Attorney General or the Assistant Attorney General for Administration[.]" 28 U.S.C. 524

***The chief prosecution witness in Librach received a total of \$9,947.65 for the support and maintenance of his family which included his wife and seven children. Hellerman, on the other hand, received \$80,000. in advance (not for subsistence) for himself only. (There is no evidence that his mother, sister, wife, or mistress shared in the proceeds.)

Congress never authorized the use of the funds of a bankrupt corporation for such a purpose. In fact, such a distribution is a crime. See 18 U.S.C. 152.

A case very similar to this one, although one in which the Government's bounty was much more limited, was presented in United States v. Librach, 520 F. 2d 550 (8th Cir. 1975), a scheme for obtaining monies from H. U. D. The key prosecution witness against that defendant was one Fowler, "who [had] arranged the fraudulent transaction for personal gain." Id. at 552. Fowler's testimony was partially corroborated by testimony of two other witnesses.

At the time of trial, Fowler had been informally granted immunity and had been granted "protective custody":

"Six months prior to trial he reported threats to his life and was relocated with his wife and seven children to another state and paid \$1,000. per month plus expenses. By the time of trial Fowler had received \$9,947.65 in 'subsistence payments' from the Government. Defense counsel first learned of the protective custody during the trial and was not informed of Fowler's support payments until several weeks after trial."

Id.*

The Eighth Circuit had no difficulty in finding this "an egregious case of prosecutorial suppression of evidence that was both favorable and material to the defense." Id. at 553. The protection and stipends given to Fowler "obviously could have affected the jury's judgment of the witness's credibility," and that credibility was crucial to the Government's case because "Fowler's testimony was the primary basis for determining Librach's guilt." Id. The parallels with Ostrer's case are obvious.

*It is noteworthy that the payments in Librach were precisely within the Department of Justice guidelines for subsistence to protected witnesses. (See Addenda 1-4 to this brief.) Furthermore, payment was made with lawful, public funds. Still, the Court required full disclosure to be made to the jury. In contrast, Hellerman was paid far in excess of the guidelines; he was paid with stolen funds; and all of this was hidden from the jury.

The Librach court made a further observation which is also apropos to Ostrer's case:

"The Government's paying a monthly subsidy to a witness is certainly a fact that should be disclosed to the trier of the facts since it is relevant to the witness's interest in testifying. Here, actually, Fowler's culpability is greater than that of the defendant. Fowler violated his public trust by fraudulently dispensing public funds. Yet the Government grants him immunity and a compensation of \$1,000 a month plus expenses. Many observers may feel this is a strange way to enforce the criminal laws."

Again, the parallel with the situation in the case at bar does not require elaboration.

It is respectfully suggested that jurors, with less firsthand exposure to prosecutorial techniques in "making cases", are usually quite surprised to find the major scoundrel as the star Government witness and, then, further surprised and -- with good reason -- perplexed and skeptical as they discover how far the Government is willing to go to get persons like Hellerman to play out that role.

III. APPELLANT'S AFFIDAVIT SUBMITTED ON THE JUROR ISSUE REQUIRES EITHER REMAND FOR AN EVIDENTIARY HEARING OR THE GRANT OF A NEW TRIAL WITHOUT FURTHER HEARING.

When the issue of the incompetence of Juror Rush to serve on the jury first arose, this Court ruled that Ostrer had not made a sufficient showing "to justify further inquiry into [her] competence." United States v. Dioguardi, 492 F.2d 70, 81 (2d Cir. 1974). At that time, Appellant was able to present the letter written by Ms. Rush to one of the defendants, plus letters from a number of psychiatrists attesting to their views that the author was mentally imbalanced. This Court stated:

"No evidence was offered of any history of mental instability on the part of Miss Rush, much less evidence of any adjudication

of insanity or incompetence. Indeed, what we do know of her past, although it is little, reflects quite the contrary situation."

492 F.2d at 81.

Now Appellant has presented an affidavit from Ms. Rush's brother attesting to a history of quite bizarre behavior and mental instability beginning in the couple of years just prior to her jury service. (A. 219) Surely the threshold has now been crossed for a hearing to be convened.

However, the Junius Rush affidavit discloses an equally serious, but heretofore entirely unknown, problem. It appears that Juror Rush met with two of her friends at her home during the period of the trial, and they and she discussed the defendants in a very prejudicial manner. The juror was advised to vote for conviction. Such pollution of the jury trial process by outside influences is wholly improper, as well as being in direct violation of the Trial Judge's repeated admonitions that the jurors not discuss the case with anyone outside the courthouse.*

"It is a fundamental principle that the government has the burden of establishing guilt solely on the basis of evidence produced in the courtroom and under circumstances assuring the accused all the safeguards of a fair trial."

Farese v. United States, 428 F.2d 178 (5th Cir. 1970).

The jury can consider only evidence presented in court. The Sixth Amendment requires a trial in which "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination and of counsel." Turner v. State of Louisiana, 379 U.S. 466, 472-473 (1965). The showing of extraneous influences is presumptively prejudicial, and entitles the defendant to a new trial, unless it can be shown to have no

*Belmont trial transcript, at 2-3, 51, and 953 (A. 1061).

possible effect on the verdict. Marshall v. United States, 360 U.S. 310, 312-313 (1959). In this Circuit, a conviction was reversed where prejudicial facts about the defendant were disclosed by one juror to the others. United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970). The critical fact is that this information was not brought out at trial and it actually got before at least one member of the jury, in her own home!* And it is likely, and certainly possible, that Juror Rush communicated impermissible information to her fellow jurors.

"We cannot tolerate prejudicial factual intrusion into that sanctum lest our courts return to darker days of our jurisprudential history. The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; and unless its piercing effect is only skin deep and without prejudice to the anatomy of the trial, we must apply a constitutional salve."

United States v. Howard, 506 F.2d 865 (5th Cir. 1975).

Until now, Appellant has been asking for an evidentiary hearing on the problems associated with Juror Rush. However, in light of the long passage of time since the trial, and in view of this Court's expressed reluctance to investigate, probe into the lives of, and embarrass jurors (see 492 F.2d at 81, reprinted at A. 164), it would appear that the better course at this point would be to grant Appellant a new trial that would, hopefully, be free from the myriad defects of his first trial.**

*One does not know, of course, whether Juror Rush discussed with her fellow jurors any information or advice she might have gotten from her friends. And, if she did discuss it, we still do not know if she gave the source of her information as her friends, or as her perceived extrasensory knowledge, or some other source. Such probing into the actual jury deliberations would not likely meet with the approval of this Court, however.

**A similar remedy, without an evidentiary hearing, was granted by the First Circuit in the recent case of United States v. Rhodes, 556 F.2d 599 (1st Cir. 1977), where the Court said at 602:

"Partly because of the number of possible issues, and partly because so much time has gone by since the discharge of the jury,

(CONTINUED ON NEXT PAGE)

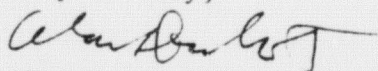
Conclusions

For the foregoing reasons, based upon Arguments I, II, and III, the judgment of the Court below in denying Appellant's motion to vacate conviction should be reversed, and a new trial should be granted.

In the alternative, based upon Argument III, the case should be remanded to the District Court for an evidentiary hearing, although the better relief would be to order a new trial without a hearing.

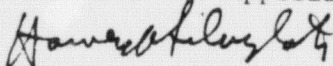
On the extraordinary facts of this case, Appellant's conviction simply cannot be allowed to stand without doing equally extraordinary damage to the integrity of our courts and to the fair, just and truthful administration of criminal justice.

Respectfully,



Alan Dershowitz
Faculty Office Building
Harvard Law School
Cambridge, MA 02138
(617) 495-4617

Counsel for Appellant Louis C. Ostrer



Harvey A. Silverglate
Ann Lambert Greenblatt
Silverglate, Shapiro & Gertner
217 Lewis Wharf
Boston, MA 02110
(617) 723-2624

Co-counsel for Appellant Louis C. Ostrer

On the brief:

Kenneth Kurnos
Silverglate, Shapiro & Gertner

(* CONTINUED FROM PREVIOUS PAGE)

we feel it would be best for the court to set aside the verdicts and grant defendants a new trial, rather than seeking now to explore the questions of the jurors' exposure to information regarding defendants' additional [extra-judicial] history."

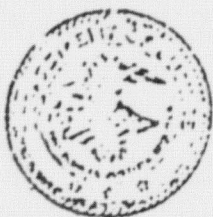
ADDENDA TO THE BRIEF

Addendum #1: Directive letter concerning "Witness Protection and Maintenance", from the Office of the Deputy Attorney General, dated March 27, 1969, designated "Memo No. 616".

Addendum #2: Directive letter concerning "Witness Protection and Maintenance -- Policy and Procedures", from the Department of Justice, dated March 15, 1971, designated "Memo No. 734".

Addendum #3: Directive letter concerning "Witness Protection Program", from the Department of Justice, dated (on the third page) December 15, 1971.

Addendum #4: Order concerning "Witness Protection and Maintenance Policy and Procedures", from the Department of Justice, dated January 10, 1975, designated "OBD 2110.2".



OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C.

MAR 27 1969

TO: HEADS OF DIVISIONS, OFFICES, BUREAUS,
UNITED STATES ATTORNEYS AND MARSHALS

MEMO NO. 616

SUBJECT: Witness Protection and Maintenance

The protection and maintenance of Government witnesses must conform to the following policies and standards:

1. Investigative agents and attorneys of the Department and of other agencies are not authorized to make protective custody or maintenance arrangements with Department witnesses. Prior arrangements made with an informant will not be continued when the informant becomes a Department witness unless specifically approved in accordance with the following principles and procedures.

2. It is the policy of the Department that protection of a witness and a member of his family is a local or state police matter to be handled by those authorities. Exceptions to this policy will be allowed only upon a finding by the Assistant Attorney General of the concerned division, in coordination with the Chief United States Marshal, that:

- (a) evidence in possession indicates it would be detrimental to the Federal interest to rely on local authorities to protect the witness or a family member and,
- (b) the life of the witness or a family member is in immediate danger and,
- (c) the witness is essential to a case in process or about to be brought.

3. Expenses of maintenance of a witness and a family member shall be limited to ordinary living expenses, excluding medical and dental expenses, and shall not exceed an average of \$ per day per adult and \$ per day per child where quarters are provided, or \$ per day per adult and \$ per day per child where quarters are not provided. The Assistant Attorney General for Administration, upon recommendation of the Assistant Attorney General involved, may authorize exceptions to the above.

4. The protective custody of witnesses, to include the provision of quarters and logistical support, will be the responsibility of the U. S. Marshals Service, who will closely coordinate all phases of these matters with the Assistant Attorney General of the division concerned prior to implementation.

5. The operation of protective details for witnesses will be under the exclusive control of the U. S. Marshals Service and in strict accordance with published directives, instructions and procedures. Exceptions for unusual requirements may be granted upon proper requests to Executive Office for U. S. Marshals.

6. All maintenance and protection arrangements will have an estimated terminal date and a planned method of termination that will bring any Department obligation to a definite conclusion. Costs of such terminal arrangements should be estimated and included in the request for protective services.

7. Maintenance and protection arrangements for members of witnesses' families will be avoided as a matter of policy. If protection for family members

is determined, by the Assistant Attorney General involved, to be an essential factor in securing a witness' testimony, all other alternatives, such as relocation with a job, protection by local authorities, or close surveillance by Federal agents, should be considered and determined to be inadequate. Arrangements, if made, must conform to the same requirements and conditions applicable to witnesses.

8. Existing witness arrangements will be brought into conformity with the foregoing standards as soon as possible.

A handwritten signature in dark ink, appearing to read "Richard G. Kleindienst". The signature is fluid and cursive, with a large initial "R" and "K".

Richard G. Kleindienst
Deputy Attorney General

-78-
DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530

March 15, 1971

Memo No. 734

TO: HEADS OF DIVISIONS, OFFICES, BUREAUS,
UNITED STATES ATTORNEYS AND MARSHALS

SUBJECT: WITNESS PROTECTION AND MAINTENANCE -
POLICY AND PROCEDURES

1. PURPOSE. THIS MEMORANDUM RESTATES RULES FOR THE PROTECTION AND MAINTENANCE OF WITNESSES. IT PLACES WITH THE UNITED STATES MARSHALS SERVICE THE RESPONSIBILITY FOR THE SECURITY OF WITNESSES, AND SETS FORTH THE GUIDELINES AND PROCEDURES TO BE FOLLOWED IN MAKING DISBURSEMENTS.
2. SCOPE. THIS MEMORANDUM APPLIES TO ALL ORGANIZATIONS WITHIN THE DEPARTMENT OF JUSTICE.
3. CANCELLATIONS. MEMO NO. 616 DATED MARCH 27, 1969, AND SUPPLEMENT NO. 1 DATED AUGUST 24, 1970, ARE CANCELLED.
4. EFFECTIVE DATE. THE PROVISIONS OF THIS MEMORANDUM ARE EFFECTIVE MARCH 15, 1971. ALL REQUESTS FOR WITNESS PROTECTION AND MAINTENANCE WILL BE PREPARED AND PROCESSED IN ACCORDANCE WITH THE AUTHORITIES AND PROCEDURES CONTAINED IN THIS MEMORANDUM.
5. BACKGROUND.
 - A. TITLE 28 U.S.C. 524 PROVIDES AUTHORITY TO USE APPROPRIATIONS OF THE DEPARTMENT OF JUSTICE FOR THE PAYMENT OF "...COMPENSATION AND EXPENSES OF WITNESSES AND INFORMANTS, ALL AT THE RATES AUTHORIZED OR APPROVED BY THE ATTORNEY GENERAL OR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION..."
 - B. TITLE V OF PUBLIC LAW 91-452 AUTHORIZES THE ATTORNEY GENERAL TO PROVIDE FOR THE SECURITY OF GOVERNMENT WITNESSES AND POTENTIAL GOVERNMENT WITNESSES, AND MEMBERS OF THEIR FAMILIES WHOSE LIFE OR PERSON IS PLACED IN JEOPARDY BY VIRTUE OF BEING A WITNESS OR INTENDED WITNESS IN LEGAL PROCEEDINGS AGAINST ANY PERSON ALLEGED TO HAVE PARTICIPATED IN AN ORGANIZED CRIMINAL ACTIVITY.
6. POLICY.
 - A. THE PROTECTION OF A WITNESS AND A MEMBER OF THE WITNESS' FAMILY IN A FEDERAL CRIMINAL PROCEEDING IS A LOCAL OR STATE POLICE

matter to be handled by those authorities. Exceptions to this policy will be allowed only upon the finding of the Assistant Attorney General of the concerned division:

- (1) The person is a qualifying witness in a specific case in process or during or after the grand jury proceedings,
- (2) Evidence in possession indicates that the life of the witness or that of a member of the witness' family or household is in immediate jeopardy, and
- (3) Evidence in possession indicates it would be advantageous to the Federal interest for the Department to protect the witness or a family member.

B. INVESTIGATIVE AGENTS AND ATTORNEYS ARE NOT AUTHORIZED TO COMMIT DEPARTMENT OF JUSTICE FUNDS FOR THESE PURPOSES AND ARE NOT AUTHORIZED TO MAKE PROTECTIVE MAINTENANCE AGREEMENTS WITH WITNESSES. AGREEMENTS MADE WITHOUT AUTHORIZATION BECOME THE PERSONAL RESPONSIBILITY OF THE MAKER. NO U. S. MARSHAL SHALL DISBURSE FUNDS TO A WITNESS OR INCUR EXPENSES WITHOUT WRITTEN AUTHORIZATION.

C. REIMBURSEMENT IN WHOLE OR IN PART BY THE LOCAL OR STATE GOVERNMENT MAY BE A CONDITION TO THE OFFER OF PROTECTION BY THIS DEPARTMENT AS PROVIDED IN THE ORGANIZED CRIME CONTROL ACT. IF SO CONDITIONED, THE TERMS OF THE AGREEMENT IN WRITING SHALL BE TRANSMITTED TO THE U. S. MARSHALS SERVICE.

7. WITNESS PROTECTION.

A. REQUESTS FOR PROTECTION ARISING IN THE U. S. ATTORNEYS' OFFICES SHALL BE TRANSMITTED BY MEMORANDUM TO THE ASSISTANT ATTORNEY GENERAL OF THE CONCERNED DIVISION AND SHALL BE MARKED "CONFIDENTIAL."

B. THE ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE CONCERNED DIVISION, OR HIS DESIGNEE, SHALL DETERMINE WHICH PERSONS MEET THE CRITERIA FOR PROTECTION. HE WILL THEN FORWARD HIS APPROVAL BY MEMORANDUM TO THE DIRECTOR, U. S. MARSHALS SERVICE, WITH A COPY TO THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION AND, WHEN APPLICABLE, TO THE U. S. ATTORNEY ORIGINATING THE REQUEST. THE MEMORANDUM, MARKED "CONFIDENTIAL", SHALL INDICATE A REALISTIC TERMINATION DATE.

IF SPECIAL ASSISTANCE SUCH AS MEDICAL SERVICE INCLUDING PRESCRIPTIONS, NAME CHANGE, JOB, ETC., IS NEEDED, A COPY OF THE MEMORANDUM REFERRED TO IN 7B, ABOVE, SHALL BE FORWARDED TO THE CHIEF, ORGANIZED CRIME AND RACKETEERING SECTION, CRIMINAL DIVISION, FOR IMPLEMENTATION UNDER PROCEDURES ALREADY ESTABLISHED BY THAT OFFICE.

C. THE U. S. MARSHALS SERVICE WILL BE RESPONSIBLE FOR THE PERSONAL SECURITY OF THOSE PERSONS DESIGNATED AS PROTECTED WITNESSES.

- D. The U.S. Marshals Service will have the sole authority to arrange for the maintenance of those persons designated as protected witnesses within the allotment provided for that purpose.
- E. No protective or maintenance services are to be furnished until authorized. Payments for maintenance up to \$36 per day for less than 30 days, or \$1,000.00 per month, may be authorized by the Director, U. S. Marshals Service, or his designee. Requests for maintenance in excess of \$36 per day or \$1,000.00 per month shall be submitted to the Assistant Attorney General for Administration for approval. To the extent practicable the U. S. Marshals Service shall adhere to the following guidelines in authorizing payments within the foregoing maximums for maintenance:

(1) MOTEL - FOR EMERGENCY CASES.

- (A) ACTUAL COST AT AS REASONABLE RATE AS POSSIBLE, UP TO \$20 PER DAY.
- (B) MEALS AND INCIDENTALS - \$8 PER PERSON PER DAY.

(2) MILITARY HOUSING.

- (A) RENTAL, WHEN BILLED ON FORM 1081 ON THE BASIS OF AN APPROVED CONTRACT.
- (B) BOQ QUARTERS - LODGING AT ACTUAL COST OF ROOM.

(3) PRIVATE RESIDENCE PREVIOUSLY OCCUPIED BY THE WITNESS. MONTHLY RENT OR MORTGAGE PAYMENTS AND UTILITIES AT MOST REASONABLE RATES AVAILABLE.

(4) PRIVATE RESIDENCE - OBTAINED BY THE DEPARTMENT. MONTHLY RENT AND UTILITIES AT MOST REASONABLE RATES AVAILABLE.

(5) FOOD AND INCIDENTALS IN OTHER THAN MOTEL - \$6 PER DAY FOR FIRST PERSON, \$0 FOR TWO, AND \$10 FOR THREE OR MORE.

(6) MEDICAL TREATMENT. AT U. S. PUBLIC HEALTH FACILITIES OR AT MILITARY FACILITIES IF AVAILABLE.

(7) TELEPHONE EXPENSE.

- (A) MOTEL - LOCAL TELEPHONE; NO LONG DISTANCE CALLS.
- (B) MILITARY RESIDENCE - CLASS B TELEPHONE; NO LONG DISTANCE CALLS.

- (c) Private Residence - Private, single line; no long distance charges.
- (8) Other Expenses. Up to the maximum daily or monthly allowance of paragraph 7E, payment of other items necessary for the adequate maintenance of the witness.
- (9) Court Attendance - Dual Payments Prohibited. A witness appearing in court on behalf of the United States is entitled to the statutory allowance under 28 U.S.C. 1821, unless the witness is a convicted prisoner. A witness appearing on behalf of the State government shall be paid by the State at state rates. If, at the time of court appearance, the witness is receiving subsistence under the guidelines herein, there shall be an appropriate reduction from these special payments.
- (10) Unpaid Bills and Removal of Furnishings. The U.S. Marshals Service shall make every effort to determine that the witness pays bills for which the Department is furnishing funds and returns property provided by the Government. If necessary, final payment may be withheld until all debts are cleared and loaned property is accounted for.
- (11) MOVING EXPENSES. MOVING EXPENSES ARE NOT INCLUDED IN THE LIMITATIONS OF PARAGRAPH 7E AND MAY BE AUTHORIZED BY THE U. S. MARSHALS SERVICE IN ACCORDANCE WITH THE METHODS THAT ARE CONSISTENT WITH THE SAFETY OF THE INDIVIDUAL, WHICH NEEDS SHALL BE DETERMINED BY THE U. S. MARSHALS SERVICE. PERSONAL INSURANCE ON HOUSEHOLD EFFECT IS NOT ALLOWABLE. MOVING EXPENSES IN EXCESS OF \$2,500 SHALL BE SUBMITTED TO THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION FOR APPROVAL.
- (12) RECEIPTS. IT WILL BE THE RESPONSIBILITY OF THE U. S. MARSHALS SERVICE TO OBTAIN A RECEIPT (SUGGESTED FORMAT FOLLOWS) EACH TIME PAYMENTS ARE MADE TO THE WITNESS.

"RECEIVED \$ _____ FOR _____
(SUBSISTENCE - RENT - MOVING - ETC.)
FOR THE PERIOD FROM _____ TO _____

NAME OF CASE DISTRICT OF TRIAL

REAL NAME OF WITNESS DATE

- (13) Release Statement. It is suggested that upon termination of protection of a witness, the U. S. Marshals Service obtain a release from further obligation, in a form similar to the following:

"The undersigned, _____, forever releases the United States Government, or its agents, from any further responsibility for protection or any disbursement of Government funds in connection therewith, from and after _____.

The undersigned further certifies that no other promise of protection or financial assistance by the United States Government or its agents has been made and that he understands none will be forthcoming.

Witness' Name

A COPY OF THE RELEASE SHOULD BE FORWARDED TO THE CONCERNED ASSISTANT ATTORNEY GENERAL.

- (14) RELOCATION AND APPROPRIATE DOCUMENTATION OF PROTECTED PERSONS WILL BE THE RESPONSIBILITY OF THE U. S. MARSHALS SERVICE..

- F. IN EMERGENCIES, THE ASSISTANT ATTORNEY GENERAL OF A CONCERNED DIVISION, OR HIS DESIGNEE, IS AUTHORIZED TO REQUEST THE U. S. MARSHALS SERVICE FOR PROTECTION ORALLY AND TO AUTHORIZE MAINTENANCE WITHIN THE LIMITATIONS OF PARAGRAPH 7E FOR A PERIOD NOT TO EXCEED 72 HOURS. HE MAY ALSO REQUEST TRAVEL FARE FOR A PERSON AND HIS FAMILY WHEN IT HAS BEEN DETERMINED THAT SUCH PERSON WILL BE A QUALIFYING WITNESS IN A SPECIFIC CASE AND THAT SUCH EMERGENCY ACTION IS NECESSARY FOR THE IMMEDIATE PROTECTION. SUCH AUTHORIZATIONS SHALL BE REGULARIZED IN ACCORDANCE WITH THE OTHER PROVISIONS OF THIS MEMO, WITHIN THREE DAYS FOLLOWING THE EMERGENCY.
- G. THE U. S. MARSHALS SERVICE SHALL MAINTAIN A RECORD IN SUCH FORM AS PRESCRIBED BY THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION. A COPY OF SUCH RECORD SHALL ACCOMPANY ANY REQUEST FOR APPROVAL SUBMITTED TO THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION.


DEPUTY ATTORNEY GENERAL

-83-
DEPARTMENT OF JUSTICE
Washington, D. C. 20530

Kemo No.

TO ALL UNITED STATES ATTORNEYS

Subject: Witness Protection Program

In an effort to expedite efficient handling of witness protection requests, please refamiliarize yourselves with the following information, which must be submitted in order for us to properly evaluate each witness protection request:

1. Name, address, date and place of birth, FBI or police numbers of witness.
2. Name and importance of prospective defendant(s) and date of anticipated date of indictment.
3. Importance of witness to the case assurance that he is definitely identified as a witness for the Government and that he has testified or is testifying before the Grand Jury.
4. Involvement of witness in the crime and his relationship (co-defendant, associate, etc. .) to defendant(s).
5. Degree of threat, including names of those who may search for the witness. Report from investigative agency substantiating the threat to the witness must be attached.
6. Realistic estimate of time between commencement of subsistence and completion of trial(s).
7. Whether witness is able to support self and family or is in prison if in prison, when parole might reasonably be anticipated.

[ADDENDUM #3]

8. Whether witness in receiving or expects to receive money from other state of Federal agencies.
9. Number and ages of dependents.
10. Whether wife is employable.
11. Any unusual medical problems of which you are aware should immediately be called to the attention of the United States Marshals Service.
12. Employability of witness, education, job skills, and past employment.
13. Each request for witness protection authorization must be signed by the United States Attorney, or, in his absence, his chief assistant, or must indicate indicate that the United States Attorney, or in his absence his chief assistant concurs in the request.
14. Each request must contain the names of all individuals for whom witness protection authorization has previously been approved by me, or by my deputies, in connection with the same Grand Jury proceeding or trial.

Requests for appearances of witnesses should now be communicated directly to John Brophy, Chief, Personal Security Unit, United States Marshals Service, Washington, D. C. In addition, problems which the witness encounters during the relocation process should be transmitted by the witness to his contact in the United States Marshals Service, not by you or your attorneys.

Finally, United States Attorneys and Assistant United States Attorneys are not authorized to make any representations to 734 witnesses. Only specifically designated representatives of the United States Marshals Service are authorized to make any promises or representations regarding relocation, protection, subsistence or employment to the witnesses.

HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

Section 730 Witness Protection and Maintenance

It is the policy of the Department of Justice that the protection of a witness and a member of the witness' family in a federal criminal proceeding is a local or state police matter to be handled by those authorities. Exceptions to this policy will be allowed only upon the finding of the Assistant Attorney General of the concerned division that:

(1) The person is a qualifying witness in a specific case in progress or during or after the grand jury proceedings,

(2) Evidence in possession indicates that the life of the witness or that of a member of the witness' family or household is in immediate jeopardy, and

(3) Evidence in possession indicates it would be advantageous to the Federal interest for the Department to protect the witness and/or a family member.

Determination of Witness' Qualifications for Protection - The Assistant Attorney General in charge of the concerned division determines which persons meet the criteria for protection, based on information provided by the United States Attorney initiating the request. Upon approval, the Assistant Attorney General advises the Director, United States Marshals Service, by confidential memorandum, of the persons to be protected, giving a realistic date as to the termination of need for providing the protection. The Chief, Organized Crime and Racketeering Section, Criminal Division is provided a copy of the approving memorandum, if special assistance such as medical service including prescriptions, name change, job, etc., is needed. Procedures have already been established by that office for provision of these services.

In emergencies, the Assistant Attorney General of a concerned division, or his designee, has authority to request witness protection orally and to authorize expenditures for maintenance for a period not to exceed 72 hours. This includes travel fare for the person and his family when it has been determined that such person will be a qualifying witness in a specific case and that such emergency action is necessary for the immediate protection of the witness. Such emergency authorizations will be regularized by the preparation and transmittal of the confidential memorandum within three days following the emergency.

• December 15, 1971

Maintenance Authority - Upon receipt of a confidential memorandum from an Assistant Attorney General requesting personal protection services to be provided, the type of services required and an estimate of cost will be developed in the Office of the Director and transmitted on Form DJ-25 to the Assistant Attorney General for Administration. When the approved Form DJ-25 is returned, plans and procedures for the protective services will be finalized, necessary personnel will be selected and a supervisor-in-charge will be designated.

Because of the sensitive nature of many cases in which protection for government witnesses and their families is necessary, direction and overall supervision of these special assignments will normally be provided directly by the Office of the Director. This is necessary to keep to a minimum the number of personnel who have knowledge of the case. However, individual United States marshals will continue to pay the salaries (including any authorized overtime) and expenses of deputies on their staffs who are selected for assignments to protect witnesses. Salaries and expenses for deputies so assigned will be paid on the basis of information contained on Form USM-36 which will be submitted biweekly for each deputy. The USM-36 certifying the time and attendance of the Supervisor-in-charge will be prepared by the Security Specialist or other staff member of the Office of the Director.

December 15, 1971

- (3) Private Residence Previously Occupied by the Witness. Monthly rent or mortgage payments and utilities at most reasonable rates available.
- ~~(4) Private Residence - Obtained by the Department.~~ Monthly rent and utilities at most reasonable rates available.
- (5) Food and Incidentals in other than Motel. \$6 per day for first person, \$8 for two, and \$10 for three or more.
- (6) Medical Treatment. At United States Public Health facilities or at military facilities if available.
- (7) Telephone Expense.
 - (A) Motel - local telephone; no long distance calls.
 - (C) Private Residence - Private, single line; no long distance charges.
- ~~(8) Other Expenses.~~ Up to the maximum daily or monthly allowance, payment of other items necessary for the adequate maintenance of the witness may be made.
- (9) Court Attendance - Dual Payments Prohibited. A witness appearing in court on behalf of the United States is entitled to the statutory allowance under 28 U.S.C. 1821, unless the witness is a convicted prisoner. A witness appearing on behalf of the State government shall be paid by the State at state rates. If, at the time of court appearance, the witness is receiving subsistence under the guidelines herein, there shall be an appropriate reduction from these special payments.
- (10) Unpaid Bills and Removal of Furnishings. The Supervisor-in-charge shall make every effort to determine that the witness

December 15, 1971

pays bills for which the Department is furnishing funds
and returns property provided by the Government. If necessary,
final payment may be withheld until all debts are cleared and
loaned property is accounted for.

- (11) Moving Expenses. Moving expenses are not included in the
limitations and may be authorized in accordance with the
methods that are consistent with the safety of the individual,
which needs shall be determined by the Office of the Director.
Personal insurance on household effects is not allowable.
Moving expenses in excess of \$2,500 shall be submitted to the
Assistant Attorney General for Administration for approval.

- (12) Receipts. It will be the responsibility of the Supervisor-
in-charge to obtain a receipt (suggested format follows) each
time payments are made to the witness.

"Received \$ _____ for _____
(Subsistence-Rent-Moving-ETC.)
for the period from _____ to _____

Name of Case

District of Trial

Real Name of Witness

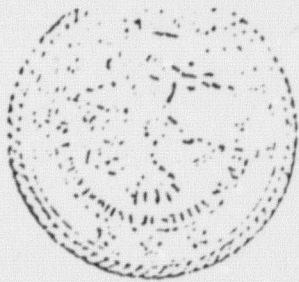
Date

- (13) Release Statement. Upon termination of protection of a witness,
the Supervisor-in-charge shall obtain a release from further
obligation, in a form similar to the following:

"The undersigned, _____, forever releases the
United States Government, or its agents, from any further
responsibility for protection or any disbursement of Govern-
ment funds in connection therewith, from and after _____

The undersigned further certifies that no other promise of
protection or financial assistance by the United States Govern-
ment or its agents has been made and that he understands none
will be forthcoming.

Witness' Name



Order

OBD 2110.2

January 10, 1975

Subject: WITNESS PROTECTION AND MAINTENANCE POLICY AND PROCEDURES

PURPOSE. This Order prescribes the procedure for establishing a person as a protected witness and places with the United States Marshals Service the responsibility for the security and maintenance of witnesses and their dependents.

SCOPE. This Order applies to all organizations within the Department of Justice.

CANCELLATION. Memo No. 734, dated March 15, 1971, and Memo No. 792, dated January 29, 1974.

EFFECTIVE DATE. The provisions of this Order are effective ten days after the date of this order.

AUTHORITY.

- a. Title 28 USC 524 Provides Authority to Use Appropriations of the Department of Justice for the payment of "...Compensation and expenses of witnesses and informants, all at the rates authorized or approved by the Attorney General or the Assistant Attorney General for Administration. . ."
- b. Title V of Public Law 91-452 Authorizes the Attorney General to provide for the security of Government witnesses and potential Government witnesses, and members of their families whose life or person is placed in jeopardy by virtue of being a witness or intended witness in legal proceedings against any person alleged to have participated in an organized criminal activity.

CONDITIONS FOR PROTECTION.

- a. The Protection of a Witness and Member of a Witness' Family in a Federal Criminal proceeding is a local or state police matter to be handled by those authorities. Exceptions to this policy will be allowed only upon the finding of the Assistant Attorney General of the concerned division that the proposed witness meets all of the following conditions:

Distribution: OBD/H-1; BUR/H-1; OBD/F-1; Initiated by: Office of Management & Finance, Operations Support Staff, Accounting Section.

Jan. 10, 1975

2110.2

- (1) The person is a qualifying witness in a specific case in process or during or after a grand jury proceeding.
- (2) Evidence in possession indicates that the life of the witness and/or that of a member of the witness' family or household is in immediate jeopardy, and
- (3) Evidence in possession indicates it would be advantageous to the Federal interest for the Department to protect the witness and/or a family or household member.

b. Reimbursement in Whole or in Part by the Local or State Government may be a condition required by the Assistant Attorney General of the concerned division to the offer of protection or technical assistance by this Department as provided in the Organized Crime Control Act. If so conditioned, the terms of the agreement shall be transmitted to the U. S. Marshals Service in writing by the concerned division.

. REQUESTS FOR AND APPROVAL OF PROTECTION.

a. Requests for Protection of a Witness shall be made by a U. S. Attorney, by an Assistant U. S. Attorney through the U. S. Attorney or by a Division Attorney, transmitted by memorandum, to the Assistant Attorney General of the concerned division and shall be marked "Confidential." The request will include the following information:

- (1) Name, address, date and place of birth, FBI or police numbers of witness.
- (2) Information and/or evidence to be supplied by the witness. (Involvement of witness in the crime).
- (3) Importance of case; name and importance of prospective defendant(s).
- (4) All other cases, federal or state, where the witness' testimony may be required.
- (5) The names of individuals for whom witness protection has previously been approved in connection with the same case; also, the names of any other individuals connected with this case likely to be placed under the Witness Protection Program.
- (6) Realistic estimate of the completion date of the trial(s).

- (7) Degree of threat, including names of those who may threaten or harm the witness. Report from investigative agency substantiating the threat to the witness must be attached.
 - (8) Number of family and/or household members to be authorized funding (name, age, relationship).
 - (9) Assets and liabilities (property, loans, alimony, support payments, mortgages, bank accounts, pensions or other income, etc.).
 - (10) Medical problems.
 - (11) Employment data (education, job skills, past employment, and employability of family and/or household members).
 - (12) Whether witness is receiving or expects to receive money from other state or federal agencies and, if so, how much.
 - (13) If witness is incarcerated, when can release be reasonably anticipated.
- b. The Assistant Attorney General in Charge of the Concerned Division, or his designee, shall determine which persons meet the criteria for protection. He will then forward his approval by memorandum to the Director, U. S. Marshals Service, in duplicate, with copies to the Assistant Attorney General for Administration and to the office originating the request. The memorandum and attachments marked "Confidential," will include items 1 through 13 of the above information to enable the U. S. Marshals Service to plan for the protection and maintenance of the witness. Prior to the arrival of the confidential memorandum, the Witness Security Division may initiate protection and maintenance of a witness upon receipt of oral authorization from the concerned division. This authorization should be given three workdays prior to the scheduled "pickup" of the witness.
- c. In Emergencies, the Assistant Attorney General of a Concerned Division, or his designee, is authorized to orally request protection and maintenance by the U. S. Marshals Service for a period not to exceed 72 hours, such authorizations shall be documented in accordance with the other provisions of this order within three working days following the request.
- d. Investigative Agents and Attorneys are not Authorized to make representations to witnesses regarding funding, protection or relocation. Neither are they authorized to make representations to prisoner/witnesses regarding where they will be housed. These matters are for decision by authorized representatives of the U. S. Marshals Service only. Representations or agreements made without authorization will not be honored by the U. S. Marshals Service.

PROTECTIVE SERVICES. The U. S. Marshals Service will be responsible for the protection and maintenance of those persons designated as protected witnesses. The Witness Security Division, U. S. Marshals Service, will supervise the protection of witnesses and/or their family and household members.

- a. Personal Security. Whether the witness is furnished protection or relocation to a place of safety is a matter solely within the judgment of the U. S. Marshals Service. The witness will normally be relocated to a place of safety, given a new identity and assisted in securing housing and employment in order to become self-sufficient.

Personal security will be furnished to the witness on a 24-hour basis at such times as it is necessary for him to return to the place of danger to testify in court or converse with government attorneys in connection with preparation for trial, or at any other time when deemed necessary by the U. S. Marshals Service.

- b. Prisoner/Witnesses may be removed from the general prison population and kept in institutions where they are subject to minimal contact with other prisoners, or may be moved to institutions where they may be safely kept in the general population. Extremely sensitive prison/witnesses may be held in secure site confinement facilities established and operated by the U. S. Marshals Service at its discretion.
- c. Initial Protective Maintenance Arrangements should be made by U. S. Marshals Service personnel in the presence of the U. S. Attorney or his representative and a representative of the investigative agency involved. Where Strike Force witnesses are involved, the Strike Force Attorney or his representative should participate. The U. S. Marshals Service will prepare and maintain records of the arrangements made.
- d. Documentation will not normally be undertaken without a legal name change. Due to costs and time requirements, only that documentation absolutely essential will be issued and such issuance will be at the discretion of the U. S. Marshals Service. Bank references, credit cards, credit references and histories will NOT be provided.

APPEARANCE OF WITNESS FOR TRIAL OR PRETRIAL CONFERENCE. All contact with protected or relocated witnesses will be made through the U. S. Marshals Service. Attorneys should make requests for the appearance of a witness at least five workdays in advance. Requests should be directed in writing or by teletype (routing indicator METRO) to: U. S. Marshals Service, Witness Security Division.

10. DUAL PAYMENTS PROHIBITED. If, at the time of pretrial conferences or court appearances, the costs for travel, room rental, and subsistence for funded protected witnesses are being funded by the Witness Support Section, U. S. Marshals Service, no "Witness Certificate" fees should be issued to the witness. If such fees are paid, there shall be a reduction in the travel and subsistence payments by the U. S. Marshals Service. A witness appearing on behalf of a State government shall be paid by the State at the State rate, and a reduction shall be made in the travel and subsistence payments by the U. S. Marshals Service. Unfunded protected witnesses are entitled to receive all the statutory witness fees, with appropriate adjustments if the witness's travel and/or subsistence expenses are paid by the government.
1. MAINTENANCE SERVICES. The U. S. Marshals Service will have sole authority to arrange for the maintenance of those persons designated as protected witnesses and their family and/or household members. Maintenance expenses are payable from the appropriation "Fees and Expenses of Witnesses." The Witness Support Section, U. S. Marshals Service, will supervise the administration of maintenance activities.
- Acquisition of gainful employment within 120 days of acceptance into the program is the responsibility of the protected witness. Job assistance, when necessary, will be provided by the Witness Security Division of the U. S. Marshals Service, but will be limited to assisting the protected person in locating one reasonable job opportunity. If this job is refused, maintenance may be terminated immediately. If a reasonable job opportunity cannot be developed immediately. If a reasonable job opportunity cannot be developed within 90 days following the last court appearance, maintenance may be terminated.
2. MAINTENANCE GUIDELINES. The maintenance guidelines for protected witnesses are set forth in Appendix 1 of this order. This appendix is being distributed only to those offices actually involved in the authorization and control of expenses of maintenance. Investigative agents and attorneys are not authorized to make any commitments regarding maintenance levels to prospective witnesses. Witnesses who are able to support themselves and their family and/or household members will not be furnished maintenance.
- The U. S. Marshals Service will make every effort to determine that protected persons pay bills for which the Department is furnishing funds and that witnesses return property provided by the Government. If necessary, final payments will be withheld until all debts are cleared and loaned property recovered.

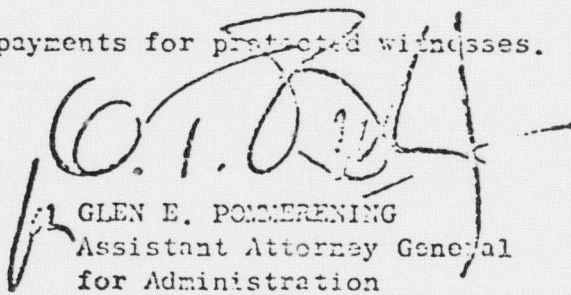
FISCAL RESPONSIBILITIES.

a. U. S. Marshals Service.

- (1) Administers Protected Witness Program funds within maintenance guidelines for appropriation 15-0311, Fees and Expenses of Witnesses, including:
 - (a) Establishment of obligations for the expenses of protected witnesses.
 - (b) Authorization and disbursement of protected witness advances.
 - (c) Accounts control and maintenance of confidential records.
 - (d) Certification of payments for protected witnesses.
- (2) Collates statistical data for Protected Witness Program.
- (3) Prepares and produces reports regarding protected witness funding.

b. Accounting Section, Operations Support Staff, Office of Management and Finance.

- (1) The recording of obligations for protected witnesses.
- (2) The recording of expenditures for protected witnesses.
- (3) The scheduling of payments for protected witnesses.


GLEN E. POLMERENING
Assistant Attorney General
for Administration

COPY RECEIVED
ROBERT B. FISKE JR.
NOV 2 - 1977
U.S. ATTORNEY
S.D. DIST. OF N.Y.